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Sup. Ct.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 312

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1946

CERTIORARI GRANTED OCTOBER 21, 1946

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

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1 In the District Court of the United States for the District of Kansas, First Division

Civil—No. 4641

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Amended complaint

Filed April 14, 1942

For his cause of action herein against said defendant, plaintiff alleges and says:

1. Plaintiff is a citizen and resident of the State of Kansas, with his principal place of business and correct post office address located at 607 East 4th Street, Topeka, Shawnee County, Kansas. That plaintiff is an individual doing business as Albert Silk Coal Company.

2. This action arises under one of the Internal Revenue Laws of the United States, to-wit: Titles 8 and 9 of the Social Security Act, being 42 U. S. C. A. 1001 et cet'ra and 1101 et cet'ra.

3. The tax hereinafter referred to was paid to the Collector of Internal Revenue at Wichita, Kansas, and the Collectors to whom said tax was paid are now out of office and are no longer Collectors.

2 4. Plaintiff now is, and during all the times herein referred to, was, engaged in the retail coal business under the above name at the above address. That in the operation of said business, plaintiff has employed various persons from whom he has collected and paid all social security taxes as required by law, such persons being others than those hereinafter mentioned. Plaintiff owns no delivery trucks in connection with said business, and contracts with independent truck owner-drivers who own their own trucks and furnish their own help, tools, gasoline, oil and other supplies for the delivery of coal at an agreed price per ton, with extra compensation if the coal is to be wheeled to the bin at the place of delivery. Said trucks do not bear the name, telephone number or other insignia of this plaintiff, or of plain-

tiff's business, and plaintiff neither has nor claims the right to exercise any regulation or control over said independent truck owner-drivers, except as to the results obtained. That said independent truck owner-drivers are free to haul for anyone desiring their services, and do in fact haul for others than this plaintiff, and are free to come and go at their own pleasure. That a part of plaintiff's sales are made on a cash and carry basis, the customers purchasing the coal at plaintiff's yards and doing their own hauling.

Plaintiff also has his coal unloaded from freight cars by various unloaders who are available to plaintiff when the coal is received, and who work on their own time and furnish their own tools and are paid an agreed price per ton, without being under the direction or control of plaintiff, except as to the results obtained. That plaintiff neither has nor claims the right to exercise any regulation or control over the work of said unloaders, except as to the results obtained.

Neither the independent truck owner-drivers nor the coal unloaders above referred to are employees of this plaintiff as that term is used in Titles 8 and 9 of the Social Security Act, but that said defendant has charged this plaintiff with taxes under said act on both said independent truck owner-drivers and unloaders, and has required and compelled this plaintiff to pay said taxes, as more fully hereinafter stated. That the assessment of said taxes was and is wrongful and unlawful for the reason that such persons are not employees of this plaintiff, but are independent contractors.

5. On or about February 26, 1940, plaintiff filed with said defendant certain claims for refunds and for the abatement of further taxes, as follows:

Claim No. 100238—Schedule No. SST:VIII

Employers Excise Tax—Title 9—Social Security Act

January 1, 1936 to December 31, 1936	$136.19
January 1, 1937, to December 31, 1937	50.49
January 1, 1938, to December 31, 1938	60.09
January 1, 1939, to December 31, 1939	57.56
Total	304.33

January 1, 1939, to date (for abatement).

Sub-Chapter A of Chapter 9 of Internal Revenue Code and Title 8 of Social Security Act

January 1, 1937, to date

For period ended June 30, 1937	$113.80
For period ended December 31, 1938	134.56
For period ended March 31, 1938	76.24
For period ended June 30, 1938	11.58
For period ended September 30, 1938	15.98
For period ended December 31, 1938	82.36
For period ended March 31, 1939	74.80
For period ended June 30, 1939	11.34
For period ended September 30, 1939	14.76
For period ended December 31, 1939	75.80
Total	621.32

That said original claims are in the possession of said defendant, and therefore copies are not attached hereto.

Thereafter said claims made under Subchapter A of Chapter 9 and Title 8 of said act were partially allowed in the sum of $314.99, with accrued interest in the sum of $38.70, which sums were subsequently reimbursed to plaintiff, and plaintiff's other claims were denied.

Thereafter and on or about January 24, 1941, said defendant demanded of this plaintiff that plaintiff return said sum of $353.69 to said defendant, informing this plaintiff that said taxes had been reassessed to this plaintiff. On or about October 17, 1941, said defendant collected from this plaintiff by means of a tax warrant said some of $353.69 together with interest, penalty and costs in the sum of $32.10, or a total of 385.79. That said repayment to said defendant was not made voluntarily by this plaintiff.

6. Said defendant has now acquired this plaintiff to file reports on defendant's form SS 1 for the years 1940 and 1941 covering independent truck owner-drivers and unloaders above referred to, and by reason thereof has now assessed an additional tax against this plaintiff in the sum of $1,934.00 for the years 1940 and 1941, and is now demanding payment of said sum from this plaintiff, with interest, penalties and costs. That said assessment is wrongful and unlawful for the reason that such persons are not employees of this plaintiff, and are not within the terms and provisions of said law, as above set forth. That plaintiff has not collected from said independent truck owner-drivers that part of the tax which would have been due from them during the years 1940 and 1941, if such persons had in fact been employees of this plaintiff.

7. Under date of June 23, 1939, the Unemployment Compensation Division of the State of Kansas ruled that said independent truck owner-drivers and unloaders, being the same persons covered by the claims above referred to, were not employees of this plaintiff, and that plaintiff was therefore not liable to the state of Kansas for unemployment compensation taxes on such persons. That plaintiff therefore has not been making reports or paying the tax to the State of Kansas.

5 8. That said assessments were made against this plaintiff in addition to the levy of the taxes required by said law upon the persons in the actual employ of this plaintiff, and that plaintiff has reported and paid the tax on his actual employees, as required by said law.

9. Plaintiff is not subject to the provisions of said act nor liable for said tax on either the independent truck owner-drivers or the coal unloaders, for the reason that said persons are independent contractors and are not employees of this plaintiff. That the acts of said defendant as herein set forth are therefore erroneous and illegal, and deprive this plaintiff of his property without due process of law, and also denies plaintiff equal protection of the law as guaranteed under the due process and equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States.

10. By reason of the above facts and circumstances, plaintiff is entitled to recover forthwith from said defendant the total sum of $925.65 and interest, as represented by the claims filed against said defendant, and for the further sum of $32.10 to reimburse plaintiff for the interest, penalty and costs wrongfully demanded and collected from plaintiff by said defendant, and to have all subsequent taxes under said act abated insofar as it relates to said independent truck owner-drivers and unloaders, and that plaintiff is entitled to recover his costs herein, and all other proper relief.

Wherefore, plaintiff prays judgment herein against said defendant for the sum of $925.65 with interest and costs, and the additional sum of $32.10 as interest, penalties and costs wrongfully collected from this plaintiff. That this court abate all subsequent taxes from this plaintiff under said act insofar as the same

6 relate to said independent truck owner-drivers and unloaders; and that plaintiff have all other proper relief.

RALPH F. GLENN,
Topeka, Kansas,
Attorney for Plaintiff.

In United States District Court

Answer to amended complaint

Filed April 21, 1942

The defendant, by his attorney, Summerfield S. Alexander, United States Attorney for the District of Kansas, answers the amendee complaint herein alleged as follows:

I. Defendant admits the allegations contained in paragraphs 1, 2, and 3.

II. In answering paragraph 4 of the amended complaint, defendant does not have sufficient information upon which to form a belief as to the allegations contained therein and therefore neither denies nor admits the allegations and leaves the plaintiff to his proof, except that the defendant denies specifically that the assessment of taxes was and is wrongful and unlawful.

III. Defendant admits the allegations contained in paragraph 5.

IV. In answering paragraph 6 of the amended complaint the defendant alleges that the allegations contained therein are immaterial to this suit and therefore require no answer. It appears from the allegations contained therein that the plaintiff has not paid additional taxes for the years 1940 and 1941, and therefore it is immaterial that additional taxes have been assessed against the plaintiff for the years 1940 and 1941 and that the United States is now demanding payment of the additional taxes for the years 1940 and 1941 from the plaintiff.

7 V. In answering paragraph 7 of the amended bill of complaint the defendant alleges that the allegations contained therein are immaterial to this suit and therefore require no answer.

VI. Defendant denies the allegations contained in paragraphs 8, 9, and 10.

AFFIRMATIVE DEFENSE

As an affirmative defense the defendant alleges that this Court is without jurisdiction to grant the plaintiff's prayer that this Court abate all subsequent taxes due from this plaintiff under the Social Security Act insofar as the taxes relate to the independent truck owner-drivers and unloaders.

S. S. ALEXANDER,
United States Attorney,
District of Kansas,
Federal Building, Topeka, Kansas,
Attorney for Defendant.

In United States District Court

Findings of fact and conclusions of law

Filed March 16, 1945

Findings of fact

1. This cause was filed by Albert Silk, d/b/a Albert Silk Coal Company, Topeka, Kansas, as plaintiff, against the United States of America, as defendant.

2. The cause of action is for the recovery of taxes paid under one of the internal revenue laws of the United States, to-wit: Employers Excise Tax, Title IX, Social Security Act; and Subchapter A of Chapter IX of the Internal Revenue Code and Title VIII of the Social Security Act, which taxes were alleged
8 to have been erroneously and illegally assessed and collected by the Collector of Internal Revenue for the years 193[illegible], 1937, 1938, and 1939.

3. Plaintiff is a citizen and resident of the state of Kansas, with his principal place of business and correct post office address located at 607 East 4th Street in the city of Topeka. Plaintiff is an individual doing business as Albert Silk Coal Company. His business consists of selling coal at retail at the above address under the above name. Plaintiff owns no delivery trucks in connection with said business, but contracts with independent truck owner-drivers for the delivery of coal at an agreed price per ton. This expense is carried by plaintiff on his books under the title of "hauling." Said trucks do not bear the name, tele[illegible]e number or other insignia of plaintiff, or of plaintiff's business, and this is not required by plaintiff.

4. Plaintiff owns a piece of property upon which is located certain equipment consisting of coal bins and tracks where railroad cars full of coal are spotted, and also two office buildings opposite each other, and between which there is a driveway to the coal scales located thereon. Plaintiff uses one of these buildings as an office where he keeps his books and his bookkeeper, and the other building on the other side of this driveway is used by the truckers as herein stated.

5. The procedure followed by plaintiff in the operation of his business is as follows: A telephone call comes into the office where plaintiff or his assistant takes down the information, including the address, the amount of coal desired, etc., and where a duplicate ticket is made out for the order. Plaintiff or his assistant then rings a bell, which rings in the room or building on the other side of the driveway where these truckers are permitted to stay, if they desire, between deliveries. These truckers consist of a number of independent men, who own their own trucks, which they have

bought and paid for themselves. They are free to come and
9 go as they please, and actually do so. They reach the yard at indefinite times in the mornings, and leave whenever they desire in the evenings. They do not report in or out to plaintiff or his bookkeeper, and no record is kept of their time. The men buy their own gasoline, repairs, tires and oil, and own all the equipment on each truck, and also own their own shovels, forks, and wheelbarrows used for delivering coal. The plaintiff does not attempt to designate where these men shall buy their gasoline, tires, oil and other supplies and repairs, and has no right to do so. The truckers also furnish at their own expense any help they may need, without any direction or control by the plantiff. In addition to the hauling these truckers do for plaintiff, they also do hauling for outside parties when and as they desire, and upon such terms as they may determine. These truckers have voluntarily arranged a call list or board which they operate and maintain in the above room used by them. Plaintiff did not request that such a board be used by the truckers, and it is a plan developed by them. Their names come up in turn at the top of the list, and when plaintiff or his office assistant rings the bell, the trucker whose name is at the top of the list or board answers the bell and is offered the opportunity of making that delivery. If the trucker who is at the top of the list desires to make that particular delivery, he gets the order for the coal, but, if for any reason that trucker prefers not to make that delivery, he so informs the plaintiff and rejects the order, and the next man on the list is then offered that order for delivery. The order which is received from plaintiff or his assistant is simply a statement of the amount of coal, the kind of coal, and where it is to be delivered, and the price. The trucker takes the slip and drives his truck which he operates himself to the proper bin in the yard and loads it himself with the particular type of coal called for by the order. He then drives the truck to the address of the customer given on the order, where he delivers the coal, and puts it in the bin and cleans up the dirt incident to the delivery. Plaintiff does not designate the route to be travelled. The driver then either returns to the plaintiff's yard or goes home
for the day, or goes to any other place which he may desire.
10 He is not required to return to plaintiff's yard. If he does return to the yard, he is not required to do any work for the plaintiff while waiting for another delivery, and the time between deliveries is frequently occupied by reading or by playing cards with the other truckers who are also waiting.

6. According to the testimony of both the truckers and the plaintiff, the plaintiff exercises no control over the truckers. They report for work at such hours as they may wish, and they leave

when they wish, and they come and go absolutely independent of any regulations, rules or contracts with Mr. Silk. They simply congregate at the plaintiff's yard and take advantage of his facilities in the hope that they will get an opportunity to haul coal to his customers who telephone plaintiff for it. Plaintiff pays these truckers a uniform price per ton for delivering coal, which he pays out of the price which plaintiff receives from the customer. If the order is a C. O. D. the trucker delivers the coal and must collect the price and bring it into the office, but no time is specified when the trucker shall pay over the money, and, according to the testimony of the men, they sometimes keep the money on hand a couple of days before making a settlement in the main office. There are no terms of employment. The truckers are not hired or discharged formally in any way as those terms are used in trade or in business. The testimony is that these truckers come and go as they wish. If they desire to leave early, they may do so, and they do so without the permission of or notice to the plaintiff or his assistant. They are paid by plaintiff as they request it, sometimes after each trip, sometimes at the end of the day, and sometimes at the end of each week.

7. The evidence discloses that in addition to the hauling said truckers do for plaintiff, they very often also haul for other parties. The evidence discloses that said truckers at such times and on such terms as they may fix; haul grain, foodstuffs, furniture, coal, wood, rock, and other material for citizens of the community, and all of this is done without the authorization, interference or control of the plaintiff in any way whatsoever.

11 8. Under the evidence in this case, the plaintiff neither has nor claims the right to exercise any regulation or control over these truckers, and does not actually exercise any regulation or control over them, and they are not employees of plaintiff, but are independent contractors, within the meaning of said laws. There is no relationship of employer and employee existing between them. The uncontradicted testimony of witnesses called on both sides is that there is no relation of employer and employee between plaintiff and these men. He does not hire them. He does not fire them. He simply maintains an exchange or place where these truckers with their own trucks and equipment can come and obtain delivery orders from him.

9. Plaintiff has another class of workers called unloaders. These are men who come to plaintiff's place of business and unload coal from the freight cars into bins or onto the ground, as the case may be. The unloaders come to plaintiff's yard and if there is any coal to be unloaded they are assigned a railroad car to

unload and put the coal in designated places. These men work on their own time and furnish their own tools, and are paid an agreed price per ton. Plaintiff likewise does not hire these men or discharge them, and in no way controls their movements. They work as long as they wish, and quit when they wish, and are not under the direction or control of the plaintiff. Plaintiff neither has nor claims the right to exercise any regulation or control over said unloaders, and does not actually exercise any regulation or control over them, and the relationship of employer and employee does not exist between plaintiff and said unloaders. These men also work for others at such times and on such terms as they wish, without the knowledge or consent of plaintiff.

10. The Collector of Internal Revenue ruled that during the period from January 1, 1936, to December 31, 1939, said truckers and unloaders were employees of plaintiff within the meaning of said laws, and therefore assessed social security taxes and federal unemployment taxes against plaintiff covering said workers. Plaintiff then filed returns and paid said taxes to the Collector of Internal Revenue. Said collector is now out of office.

11. On or about February 26, 1940, plaintiff filed with defendant claims for refund of said taxes, as set forth in paragraph 5 in plaintiff's complaint herein.

12. Subsequently said claims for refund filed by said plaintiff were partially allowed by defendant in the sum of $314.99 with accrued interest in the sum of $38.70, which sums were then paid to plaintiff by defendant. Defendant disallowed the remaining part of plaintiff's claims for refund.

13. On or about January 24, 1941, the Collector of Internal Revenue reassessed to plaintiff taxes in the amount of $353.69 which had been refunded to plaintiff as above set forth, and, on or about October 17, 1941, defendant collected from plaintiff by means of tax warrants the reassessment of $353.69, together with interest, penalties, and costs in the amount of $32.10, or a total of $385.79.

14. Defendant has since required plaintiff to file reports covering said independent truck owner-drivers and unloaders above referred to, and defendant has also assessed additional taxes against said plaintiff on the theory that said persons were employees of plaintiff under the terms and provisions of said laws.

15. Plaintiff thereupon brought this action against defendant to recover the sum of $925.65 with interest and costs, and the additional sum of $32.10 as interest, penalties, and costs wrongfully collected from plaintiff by said defendant as above set forth.

13 *Conclusions of law*

1. Plaintiff is not subject to the provisions of said laws, nor liable for said taxes under either of the above provisions of said laws, on either the independent truck owner-drivers or the coal unloaders, for the reason that said independent truck owner-drivers and unloaders are independent contractors, and are not employees of plaintiff within the meaning of said laws. The ruling by the Collector of Internal Revenue that said workers were employees of plaintiff was and is erroneous.

2. The assessment against and collection of said taxes from plaintiff by the Collector of Internal Revenue was illegal and erroneous.

3. Plaintiff is entitled to recover judgment herein against said defendant, and said judgment should be for plaintiff in the amount of $1,131.49, with interest from December 13, 1943, at the rate of 6% per annum until paid, and for the costs of this action.

Dated this 13th day of December 1943.

J. FOSTER SYMES,
United States District Judge.

In United States District Court

Judgment

Filed March 16, 1945

And now on this 13th day of December 1943, this cause comes on for hearing in its regular order on the docket, the plaintiff being present in person and by his attorney, Ralph F. Glenn, and the defendant, United States of America, being represented by Harlow B. King, Assistant United States Attorney for the District of Kansas.

And thereupon, the plaintiff introduces his testimony and rests, the defendant introduces its testimony and rests, and counsel argue the cause to the Court.

14 And the Court, being fully advised in the premises, finds the issues generally in favor of the plaintiff and against the defendant and requests the plaintiff to prepare the proper findings of fact and conclusions of law upon which a judgment for the plaintiff may be decreed and entered.

And now on this 15 day of March 1945, this cause comes on for judgment and the Court makes findings of fact and conclusions of

law, the same being filed herewith and made a part hereof as fully as though copied herein.

It is therefore by the Court duly considered ordered, adjudged, and decreed that the plaintiff, Albert Silk Coal Company, do have and recover of and from the defendant, United States of America, judgment in the principal sum of $947.04, together with interest in the sum of $184.45 to and including December 13, 1943, being a total sum of $1,131.49, the same to draw interest at the rate of 6% from and after December 13, 1943, until paid.

It is further ordered that the defendant pay the costs of this action.

J. FOSTER SYMES, *Judge Assigned.*

In United States District Court

Stipulation re judgment

Filed April 13, 1945

Whereas, on the 15th day of March 1945, judgment was entered in the above entitled cause in a total sum of $1,131.49 with interest at the rate of six percent from and after December 13, 1943 until paid and that the defendant pay the costs of said action.

It is now stipulated and agreed by and between plaintiff and defendant through their respective counsel that only the principal sum of said judgment in the amount of $947.04 shall draw interest as provided in said judgment and said plaintiff hereby agrees that he will accept in full satisfaction of said judgment the sum of $1,131.49 together with interest on the sum of $947.04 from December 13, 1943 until paid.

It is further stipulated and agreed that the costs which
15 the defendant shall be required to pay in accordance with the provisions of said judgment shall not include any of the costs than those which may be legally assessed against the United States under the provisions of Section 258 of Title 28, U. S. C. A.

Dated this 11th day of April 1945.

RALPH F. GLENN,
Attorney for Plaintiff.
LESTER LUTHER,
Attorney for Defendant,
Assistant U. S. Attorney.

In United States District Court

Stipulation amending prior stipulation

Filed May 9, 1945

The stipulation herein entered into by and between the plaintiff and defendant on the 15th day of March 1945, is amended in the following particular:

By striking out all of paragraph two thereof and substituting for said paragraph the following: "It is now stipulated and agreed by and between plaintiff and defendant through their respective counsel that only the principal sum of said judgment in the amount of $947.04 shall draw interest as provided in said judgment and said plaintiff hereby agrees that he will accept in full satisfaction of said judgment the sum of $1,131.49 together with interest on the sum of $947.04 from December 13, 1943, computed to a date thirty days before the date of the refund check issued by the defendant in payment thereof."

Dated this 9th day of May 1945.

RALPH F. GLENN,
Attorney for Plaintiff.
LESTER LUTHER,
Assistant U. S. Attorney,
Attorney for Defendant.

16 In United States District Court

Notice of Appeal

Filed June 14, 1945

To ALBERT SILK and to RALPH E. GLENN, His Attorney of Record:

You and each of you are hereby notified that the defendant, United States of America, intends to and does hereby appeal from the rulings, orders and judgments made and entered in the above-entitled cause, and particularly the Findings of Fact and Conclusions of Law and the Judgment, entered as of March 15, 1945.

This appeal is taken from the District Court of the United States for the District of Kansas, First Division, to the Tenth Circuit Court of Appeals, as by law provided.

Dated at Topeka, Kansas, this 14th day of June 1945.

RANDOLPH CARPENTER,
United States Attorney,
District of Kansas.
LESTER LUTHER,
Assistant U. S. Attorney.
EUGENE W. DAVIS,
Assistant U. S. Attorney.

ACKNOWLEDGMENT OF SERVICE

The undersigned attorney for the plaintiff acknowledges service of the above and foregoing Notice of Appeal this 14th day of June 1945.

RALPH F. GLENN,
Attorney for Plaintiff.

In United States District Court

Statement of points on which Appellant intends to rely

Filed July 6, 1945

The points upon which defendant-appellant intends to rely on this appeal are as follows:

1. The Court erred in finding that the plaintiff neither had nor claimed the right to exercise any control over the truckers or over the coal unloaders, and did not actually exercise any control over them.

17 2. The Court erred in finding and holding that there was no relation of employer and employee between the plaintiff and the truckers, or between the plaintiff and the coal unloaders, and that the truckers and the coal unloaders were independent contractors.

3. The Court erred in holding that plaintiff is not liable for employment taxes under the Social Security Act and the Internal Revenue Code with respect to either the truckers or the unloaders.

4. The Court erred in holding that the assessment against and collection from the plaintiff of such taxes were erroneous.

5. The Court erred in holding that the plaintiff was entitled to recover judgment from defendant.

6. The Court erred in entering judgment in favor of plaintiff and against defendant.

7. The Court erred in failing to hold that the evidence disclosed an employment relationship between the plaintiff and the truckers, and between the plaintiff and the unloaders, within the meaning of Titles VIII and IX of the Social Security Act, and of Subchapters A and C of Chapter 9 of the Internal Revenue Code.

8. The Court erred in failing to hold that the taxes assessed against and collected from the plaintiff were lawfully and properly assessed and collected.

9. The Court erred in failing to enter judgment in favor of the defendant.

RANDOLPH CARPENTER,
United States Attorney.
LESTER LUTHER,
Assistant United States Attorney.

Service of copy of the foregoing Statement of Points upon me this 6th day of July 1945 is hereby acknowledged.

RALPH F. GLENN,
Attorney for Plaintiff.

18 In United States District Court

Designation of contents of record on appeal

The defendant-appellant in the above entitled cause hereby designates the parts of the record which it considers necessary in this appeal, as follows:

1. Plaintiff's amended complaint.
2. Defendant's answer to amended complaint.
3. Transcript of trial proceedings.
4. Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Stipulation of April 10, 1945, to correct judgment.
8. Stipulation of May 9, 1945, to amend prior stipulation.
9. Notice of appeal.
10. This designation of contents of record on appeal.
11. Statement of points on which appellant intends to rely.

RANDOLPH CARPENTER,
United States Attorney.
LESTER LUTHER,
Assistant United States Attorney.

Service of copy of the foregoing Designation of Contents of Record on Appeal upon me this 6th day of July 1945 is hereby acknowledged.

RALPH F. GLENN,
Attorney for Plaintiff.

Filed in the District Court July 6, 1945.

In United States District Court

Order extending time for docketing cause

And now on this 13th day of July 1945, this cause comes on to be heard upon the Motion of the defendant for an Order of the

Court extending the time for filing the Record of Appeal and docketing the action in the Circuit of Appeals for the Tenth District.

And the Court, being fully advised in the premises, finds that said motion should be and the same hereby is sustained.

It is, therefore, by the Court duly considered and ordered that the time in which the Record of Appeal shall be filed and the action docketed in the Circuit Court of Appeals for the Tenth District be and the same hereby is extended to and including the 10th day of September 1945.

GUY T. HELVERING, *Judge.*

Filed in the District Court July 13, 1945.

In United States District Court

Transcript of trial proceedings

Filed July 7, 1945

Trial had before the Honorable J. Foster Symes, United States District Judge assigned, at Kansas City, Kansas, Monday, December 13, 1943.

Appearances: For the plaintiff, Mr. Ralph Glenn, Attorney at Law, Topeka, Kansas. For the defendant, the United States of America, Mr. Harlow B. King, Assistant United States District Attorney, District of Kansas, and Mr. John Fisher, Department of Justice, Washington, D. C.

The parties having announced ready, the cause proceeded as follows:

Opening statement for plaintiff

Mr. GLENN. I desire to make an opening statement for the plaintiff. Mr. Silk, Albert Silk, is a resident of Topeka, Kansas, and is engaged in the retail coal business located at 607 East Fourth Street in the city of Topeka. He has been located at that place for quite a number of years. Mr. Silk owns no trucks or trucking equipment of his own, and has his hauling done by what he considers independent haulers or truckers. It is our contention in the case that Mr. Silk employs independent truckers or contracts for independent truckers, rather, to do his hauling for him.

In 1939 rulings were handed down, and also in 1490 by the Internal Revenue Department to the effect that coal retailers that hired independent truckers or what they called hired truckers, or hired drivers, were not within the provisions of the Social Security Act. I might say at this time for the

benefit of the Court that the questions presented here are two: First, whether or not these men whom we call independent truckers or independent drivers——

The COURT. They own their own trucks?

Mr. GLENN. They own their own trucks, own their own equipment and so forth, whether they are independent contractors, or whether they are employees of Mr. Silk within the provisions of the Social Security Law. In addition to the truckers Mr. Silk has men who come in and out of his yard from time to time whom he pays by the ton, so much a ton to unload cars of coal that are set on the railroad sidings near his yard. He contends also these men are independent workers, and that they simply paid so much a ton to unload a car of coal from the car into some location in his yard. Those men also work on their own time, are paid by the ton, and furnish their own tools.

Now it is our contention that Mr. Silk neither has the right to exercise any control over those men, either the truckers or the unloaders, and actually exercises no control over them, so they are not employees, but they are independent workmen. Under the rule which controls the Social Security cases, that is the test as we understand it, is the normal test of whether or not the relationship is that of employer and employee.

The Social Security law sets up those specific standards by which that question is determined. In 1939 these rulings that were announced in other cases by the Department were distributed to other coal dealers, one of them dated July 1, 1939. There is one dated March 21, 1940, and another dated April 22, 1940, decision by Field Examiners or by the Internal Revenue Department represented in, whatever they call them, in similar cases. So in 1939 after that first decision came down, Mr. Silk made application first to the Kansas Unemployment Compensation Department for a ruling that he was exempt from the provisions of the state law and would not have to pay Social Security Tax or Unemployment Compensation Tax to the State of Kansas on these workmen. After a hearing before the Kansas board or department, a ruling was made that Mr. Silk was not the employer of these drivers or unloaders; and therefore these men were not employees and were not within the provisions of the Act.

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The COURT. Who made that decision?

Mr. GLENN. The Kansas Unemployment Compensation Board.

The COURT. The State Board?

Mr. GLENN. The State Board, yes, because there is a state law which is a sort of companion law with the Federal Act. Now at about the same time we took the matter up with the Internal Revenue Department at Topeka, first with Mr. Farrell, who was then in charge of the Topeka office or at least of this type of work

in the Topeka office, and later also took the matter up with the Wichita office of the Internal Revenue Department and filed claims for a refund of the taxes that had been assessed against Mr. Silk. The years in question so far as this case are concerned are a part of 1936, I believe, all of 1937, all of 1938, all of 1939, and the early part of 1940. Now, of course, this transaction, this case having started about early in 1940 no further claims have been filed. We have this as a test case. First I should say that the Department asked us to obtain, and we did obtain as soon as possible from as many men as possible, a written authorization from the various men involved to present their case and make refund. Those have been filed with the Internal Revenue Department, so we do not have those original instruments. After that was done, the Internal Revenue Department considered our claims, and granted the claim in part, but not in full, and made an actual refund to Mr. Silk of something like $350. We could not get the Internal Revenue Department to clarify the rulings because we did not know who they exempted and who they taxed. We do not know from their letters which will be offered here, so after some consideration the Internal Revenue Department reconsidered the matter, reassessed the tax against Mr. Silk. We then filed this case in order to get a total determination of the question. I am
22 not going into any more detail in my opening statement, because I don't believe it is absolutely necessary. I should like to say that Mr. King of the United States Attorney's office and I discussed this matter, and it is our desire, and in fact we are prepared to present the evidence in order to determine the question of law involved. We did not think it was necessary to burden the Court with the question of computing the tax. So it will require this and more. May I make this statement, Mr. King?

Mr. KING. Yes.

Mr. GLENN. That we proceed with the introduction of evidence in order for this Court to determine whether or not these people are independent contractors or self-employers or whether they are employees, and then reserve jurisdiction of the case if you will until the parties can make an attempt to compute the tax based upon your ruling. I think that will save time.

The COURT. Go ahead with your evidence.

Mr. GLENN. First perhaps I should offer a stipulation which the parties have entered into.

(An instrument handed to the reporter was marked for identification as "Plaintiff's Exhibit No. 1."

Mr. KING. Does the Court want to hear from us at this time?

The COURT. Briefly; yes.

Mr. KING. All right, if the Court please, Mr. Fisher of the Department is here and he will make the opening statement.

Mr. FISHER. If the Court please, the position of the Government is that the truckers and unloaders involved here are employees because there is a sufficient right of control, a sufficient practical control to place them under the Act, the Social Security Act. This Act is full of problems. It is a new law. It is in the process of clarification now. These rulings of the Department arise out of the fact that the law is not clear, has not been fully clarified, but we do urge here that there are sufficient elements of control or right of control, and actual control to place these people under the Act. At this state I should like to say that included in the plaintiff's complaint is a request for an injunction as to future laws.

23

Mr. GLENN. That is not being pressed.

Mr. FISHER. That is not being pressed. May we consider that out of the case then?

Mr. GLENN. I think so. We are simply trying to get a ruling of the Court as to the questions involved.

Mr. FISHER. I had some doubts.

Mr. GLENN. I think what Mr. King said here this morning that what we wanted the Court to consider is absolutely correct. However that does appear in the pleadings, although I do not think we need to go into it. We do think it appears there, and if the Court is going to retain jurisdiction to determine the amount of tax allowed, I think it might be reserved.

Mr. FISHER. Perhaps I need not say anything more except there have been some decisions, a decision by the Western District of Michigan.

The COURT. I will hear argument about the law after we get the evidence.

Mr. FISHER. I think that is all.

Mr. KING. I think that probably we should have a stipulation here in the record to the effect that the only parties involved here for the consideration of the Court are the truck drivers and the coal unloaders; that there is no question as to the bookkeeper, the yard foreman, and the watchman, so that we will stay right on the path that we set out; is that correct?

Mr. GLENN. That is correct. Mr. Silk had two or three men, if the Court please, who are admittedly employees but I thought my opening statement made it clear that the only question raised was as to the truckers and unloaders.

The COURT. You are just suing them to recover taxes paid on the wages or the alleged wages of the coal haulers and coal unloaders?

24

Mr. GLENN. That is correct.

The COURT. All right; go ahead.

ALBERT SILK, the plaintiff herein, called as a witness, in his own behalf, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

Q. State your name.
A. Albert Silk.
Q. Where do you live?
A. Topeka.
Q. What is your business?
A. Retail coal.
Q. How long have you been engaged in that business?
A. Twenty-six years or more.
Q. Where is your place of business located in the city of Topeka?
A. 605 and 607 East Fourth.
Q. Do you have any other business except the retail coal business?
A. None.
Q. You are the plaintiff in this case?
A. That is right.
Q. Mr. Silk, did you about the latter part of the year 1939 receive copies of rulings made by the Internal Revenue Department on the question of independent truckers from the Department or from some other agency?
A. I received copies of cases handed down by the Department to the Missouri Valley Coal Association of which association I was a member at the time.
Q. One of those cases was from Indiana?
A. Yes, sir: a case I believe in Goshen, Indiana, and similar to ours in every detail.
Q. Was there another case in Kansas City, Missouri, on a similar matter?
A. Yes, I believe the Kansas Coal——
The COURT. Just announced?
25 A. Yes.
Q. Following the receipt of those rulings, did you then make an application before the Kansas Unemployment Compensation Department for an exemption under the Act?
A. I have.
The COURT. Under the Federal Act, or State Act?
Mr. GLENN. State Act.
The WITNESS. I had.

By Mr. GLENN:

Q. As I understand it, just to clarify the record, you make no claim for exemption as far as your bookkeeper, office man, and your yard foreman is concerned; is that right?

A. That is right.

Q. Your claim only goes to truckers and unloaders?

A. That is right.

Q. Was there a hearing before the Kansas Unemployment Compensation Department?

A. Yes.

Q. Do you know the result of that hearing?

The COURT. That isn't the question. That is a question of the record. He can't testify to that.

Mr. GLENN. That is right. We have it here. Before that, or following that hearing before the Kansas Department, did you then make claim before the Federal Internal Revenue Department?

A. Yes.

Q. Do you know about when that was, Mr. Silk?

A. Yes; I think 1939 and 1940. I couldn't say exactly now.

Q. Early in 1940, wasn't it?

A. Somewhere around there.

Q. That is approximate. Was there a ruling on that claim or on those claims which you made?

A. Yes.

Q. Was some money refunded to you because of that claim?

A. Yes.

Q. Approximately how much?

26 A. Oh, $300. I can't say the exact amount, but it was over $300.

Q. Is it in the stipulation?

A. Yes.

Q. After there was a refund to you made on your claim, was that tax then reassessed against you?

A. It was.

Q. Did you repay it?

A. I had.

Q. Was there a tax warrant issued against you at the time you repaid it?

A. I think there was. I know we repaid the money.

Q. There is no dispute about that.

Mr. KING. As far as that goes I think it is immaterial. I don't think there is any dispute about it.

By Mr. GLENN:

Q. After you repaid that money, Mr. Silk, did you then file this action?

A. Yes.

Q. Now getting down to the facts involved in the case, and we are not concerned, Mr. Silk, with dollars and cents. We will go into that later; have you at any time during the years involved in this case owned any trucks of your own?

A. I have not.

Q. Do you own any trucks?

A. I do not.

Q. Do you have your coal delivered from the yard?

A. Yes.

Q. How is that delivery done; I mean by whom?

A. By coal haulers.

Q. So far as you know, who owns the trucks which they use?

A. They do themselves, as far as I know.

Q. Do you have any interest in those trucks yourself?

A. I have not.

Q. Who pays for the repairs on those trucks, as far as you know?

A. They pay them themselves.

Q. Do you pay for any repairs?

A. I do not.

27 Q. Who buys the gasoline and oil and tires for their trucks?

A. They do.

Q. As far as you know

A. These coal haulers do as far as I know.

Q. Do you furnish any tires or repairs or gas or oil of any kind?

A. I do not.

Q. Do you require them to buy their gas or oil at any particular place?

A. I do not.

Q. Or their tires at any particular place?

A. I do not.

Q. So far as you are concerned, Mr. Silk, are they permitted to purchase their gas and oil and tires and repairs any place they please?

A. That is right.

Q. Do you make any allowance of any kind to them for that expense?

A. I do not.

Q. How do you pay them for the services they perform for you?

A. So much a ton.

Q. Has that price varied some through the years?

A. It has.

Q. Have you ever paid them on any other basis than by the ton the years in question?

A. Not as I know of.

The COURT. You pay them so much per ton to have it delivered?

Mr. GLENN. In order to make that clear to the Court——

The COURT. Does the distance they have to go make any difference?

Mr. SILK. In some cases.

The COURT. Just answer yes or no.

A. Yes.

The COURT. All right, that is all.

28 By Mr. GLENN:

Q. Does it make a difference as to whether the coal is wheeled in or carried in, or shoveled off?

A. You mean pay?

Q. Yes.

A. Yes.

Q. What is the rate for just straight trucking, that is the rate you were paying back in 1937, 1938, and 1939?

A. Along in there, if I remember, it was 50 cents and 75 cents for domestic hauling, and for steam hauling, approximately those figures.

Q. Then later on it was increased ten cents a ton; is that correct?

A. That is right.

Q. If those men needed any helper on their truck, who furnished the helper?

A. They furnished the helper.

Q. Did you furnish a helper to help them unload the coal at the point of destination?

A. At first we did.

Q. I mean during the years in question, 1937, 1938, and 1939?

A. I know we used to. Then we gave them an increase in pay, so they will have their own helpers.

Q. During the years in question here, did you furnish them helpers?

A. If the place was bad, we did give them a helper.

Q. Was that plan later changed?

A. That plan was later changed.

Q. What was it later, and what is it now?

A. We increased their pay at that time ten cents a ton, so they could hire their own helpers if they want them.

Q. Who determines whether or not they need a helper?

A. They do.

Q. Do you have any choice over this helper they select?

A. I do not.

Q. Do you have any determination of the fact as to whether they should have a helper?

A. I do not.

Q. Is there any equipment used on these trucks to handle the coal such as shovels and forks?

A. Shovels and forks.

Q. Do you own that equipment?

A. I do not.

Q. Who owns it, as far as you know?

A. These haulers do.

Q. Do the haulers furnish all their own equipment for the loading and unloading of coal?

A. As far as I know I do.

The Court. How did they originally buy their trucks?

A. Your Honor, I don't know.

The Court. Did you finance them?

A. No; I did not.

The Court. Guarantee their note as payment of the purchase of the truck?

A. I did not.

The Court. Any finance company?

A. No.

The Court. How did you originally get hold of them? Did they just come in and ask for jobs?

A. That is right.

The Court. Stated they had their own truck and wanted to do some hauling?

A. Yes, sir.

By Mr. Glenn:

Q. You at one time used the Yellow Cab Company and the Transfer Company for hauling, did you not?

A. Years back we have.

Q. Before you used a different method of hauling?

A. Well, we have used both, anything we could pick up when business is rushing.

Q. That would be the Topeka Transfer Company?

A. The Merchant's Transfer Company.

Q. And the Yellow Cab Company?

Q. And the Yellow Cab Company.

Q. When they had a delivery of coal to make, who determined the route or the street over which they would travel to make that delivery?

A. They did themselves.

Q. Did you direct in any way the route they had to travel to reach their destination?

A. I did not.

Q. Or the route they would travel in coming back to the yard?

A. I did not.

Q. Will you please describe to the Court, Mr. Silk, the arrangement of your office building, your present office building, and the one you previously used, so that the physical set-up will be in the record.

A. Well, we have an office, scales, a place where they drive, the haulers. They have made a board themselves as to who takes the next load.

Q. I mean, Mr. Silk, just the arrangement of the building.

A. We have an office and a scale and a place for them to stay in.

Q. There are two office buildings, are there not?

A. That is right?

Q. With a driveway between them where the scale is located?

A. That is right.

Q. Is this building to the west the building which the truckers use for a waiting room?

A. At the present time.

Q. At the present time. It was formerly your office, was it not?

A. Up until six years ago.

Q. And then you built the building on the east which is your present office building.

A. That is right.

Q. Is there any time fixed by you at which these men must report for duty?

A. No, sir.

Q. Do you have any written contract of any kind with them?

A. I have not.

Q. Have you had during the years in question?

A. I have not.

Q. Tell the Court whether they can come and go at will or whether you fix the time at which they come and go.

31 A. They can come and go as they will and leave when thy want to. They can take an order if they want to, and they don't have to take it if they don't want to. It is up to them.

Q. As a matter of fact, does the time at which these men report in the morning and I mean by report the time at which they come to your place of business, does that vary with the men?

A. It does.

Q. Do some of them come early and some of them come late?

A. That is right.

The COURT. Do they take their trucks away every night when they go home?

A. That is right.

By Mr. GLENN:

Q. Do you have any right and do you exercise any right to tell them to report at a certain time?

Mr. KING. We object, if the Court please, as calling for a conclusion of the witness. Let him tell what they do. I think that is a question for the Court.

The COURT. Sustained; it is calling for a conclusion.

By Mr. GLENN:

Q. Have you at any time, Mr. Silk, told them to report at a certain hour? I believe you have answered that.

A. Yes.

Q. You said they came and went as they please. That is repetition. When an order comes into your yard, how is it determined as to who makes the delivery?

A. They determine that among themselves. They made up a board with their names on it, and they start out, the first man out was the last man, or went to the bottom of their list they made up, and each man took his turn as he rang for a truck.

Mr. GLENN. Do you attempt to determine now the order in which they go out on deliveries?

A. I do not.

Q. Mr. Silk, if an order comes in for delivery, do you
32 ask a man to make it, and does he have the right to refuse it?

A. Not only does have the right, but they exercise it quite often.

Q. Is it a common occurrence down in your business for the next driver up on the list to decline the delivery you have to be made?

A. They have done it.

Q. Has that been a common occurrence?

A. Yes, sir.

Q. Do they haul for other people during the period they are hauling for you?

A. They do. They can.

Q. Tell the Court whether or not they actually haul for other coal dealers as well as for other parties?

A. Some of them have done it.

Q. What other things have they hauled as far as you know during the coal season of the year?

A. They can haul anything they want. They have hauled grain, they have hauled hay, household furniture, or anything they want to.

Q. Do calls come into your office from other people for truckers to come over and haul for those other people?

A. We have had them.

Q. And when these calls come in, you give the message to the man who hauled?

A. I tell him if they want to.

Q. You tell them if they want to what?

A. I tell them there is a call from another yard. If they want to go to haul they do, or they don't. I just deliver the message to them some other yards need help.

Q. Does that apply also for calls that come in for trucking other than coal?

A. That is right.

Q. As a matter of actual fact, Mr. Silk, I will withdraw that. If a man makes a delivery for you, is he required then to report back to the yard?

A. He does not have to.

Q. And in many cases do they not report to the yard?

A. In many cases they make a delivery and go on wherever they want to.

Q. Are they required in any way to come back to the yard or report in to you over the phone or anything of that sort?

A. No, sir.

The COURT. Do they have to carry your name on their truck?

A. They do not, your Honor.

Q. Any name on the truck at all?

A. Years back, long before this case was in question even it was the custom of the yards.

The COURT. I am just asking you?

A. Not now.

The COURT. Was your name on any of their trucks?

A. Years back.

The COURT. Is it today?

A. No, sir.

The COURT. During this time involved in this lawsuit?

A. I believe there was one truck that had a sign.

The COURT. Is that all?

A. As far as I can remember; yes.

The COURT. Have that sign on now?

A. I never paid no attention. It is not compulsory.

The COURT. Do you have any advertising matter on the truck at all?

A. No, sir.

Mr. GLENN. Your telephone number and your address is not on the truck, as far as you know?

A. They haven't it.

Q. You don't require anything of that sort?

A. No, sir; I do not.

Q. As a matter of fact the man who did have the one sign on his truck was one of the old haulers who had been hauling for a number of years?

The COURT. Your questions are very leading.

Mr. GLENN. I know they are.

A. May I answer?

(Last question read by the reporter.)

A. That is right.

By Mr. GLENN:

Q. The truckers now go back and forth past your window as they weigh in and out, do they?

Mr. KING. I am going to have to object to the leading question there.

Mr. GLENN. That is just a preliminary question. I will put it this way. Do you see the trucks as they go by into your yard now?

A. As they weigh in?

Q. Yes.

A. I do now, because I do the weighing.

Q. Have you had any truck that was hauling for you with your name on them in the past few years: two or three years?

A. Years back?

Q. No, in the past few years, during the time this case has been pending.

A. I will answer that one truck as I stated before I told you.

(An instrument handed to the reporter was marked for identification as "Plaintiff's Exhibit No. 2.")

By Mr. GLENN:

Q. I now hand you plaintiff's Exhibit 2, and ask you to state what it is.

A. It is a copy of our record ledger.

Q. Under what heading do you list the cost, or the amount, the rate that you pay the truckers about whom you have just testified?

A. Under hauling.

Mr. GLENN. We offer in evidence Plaintiff's Exhibit 2.

The COURT. Any objection?

Mr. KING. No objection.

By Mr. GLENN:

Q. Mr. Silk, going back to a point I was questioning you on just a moment back, are there actually or have there been cases where the men have not returned to your yard after they have made deliveries?

The COURT. He said there were some cases. He has already testified.

Mr. GLENN. I though I had covered that. Mr. Silk, are there days that some of the truckers do not come to your place at all for hauling?

A. That is right.

Q. That is frequent occurrence or common occurrence?

A. A frequent occurrence; yes.

Q. Do they speak to you in advance and make arrangements for that time off?

A. They do not.

Q. Is one of the men who has hauled for you, Mr. E. M. Thompson?

A. Yes.

Q. Do you recall an incident in 1939 when he did not come down to do hauling for you?

A. I do.

Q. Will you tell the Court what that incident was, please?

A. He took a job working in the city auditorium, and he never showed up and never told anybody about it. We did not know until days after that he was working there.

Q. Did his truck continue to come down to your place of business for hauling during that time?

A. It did.

Q. Who was driving the truck, do you know?

A. Someone he got, someone he hired.

Q. Did you have anything to do with the selection of the new driver with Mr. Thompson's truck?

A. I did not.

Q. Did he make any arrangements in advance with you about it?

A. He did not.

Q. Do you recall an incident at about the same time or during the time in question here when some of the men went to Liberal, Kansas.

36 A. That was later, after that.

Q. Tell the Court about that.

A. Either three or four of the drivers went and was gone almost a week. Three or four days, maybe a week, didn't even know where they went till they came back to hauling again.

Q. Did they report in to you that they were leaving?

A. No, sir.

Q. Do you have a trucker by the name of Carl Wodl?

A. Yes.

Q. Is he the man who went to a farm to work?

A. That is right.

Q. Tell the Court about that transaction.

A. There isn't much to tell. He sold his truck and went to work on a farm.

Q. Did you know anything about it at the time or in advance?

A. No, I did not.

Q. Any arrangements made with you in advance about it?

A. No, sir.

Q. Did you know anything until after it had all occurred?

A. Until after it had happened. I heard rumors.

Q. Are there any kind of instructions, written instructions given out to your drivers?

A. None. You mean the truck drivers, instructions?

Q. No, I mean written instruction as to how they are to do?

A. No, sir.

Q. As far as you know who purchases and pays for the license tags used on these trucks?

A. They do.

Q. Do you pay any part of the cost of the license?

A. No sir; I do not.

Q. By that I mean the state license, the tag. Now one other thing I want to go into, Mr. Silk, is the question of chutes; and I have reference to the chutes used in unloading. Do you have chutes in the yard?

A. I do.

Q. For unloading coal?

A That is right.

37 The COURT. He said he furnished no equipment.

Mr. GLENN. I'm leading up to another point, Judge, that I want to develop there. There are times when customers request chutes to be used in unloading the coal from the trucks into the house?

A. They do.

The COURT. You furnish those, do you?

A. May I explain that, Your Honor. There are different distances from the truck to the house, in the unloading. We have a number of chutes that they use in the yard.

The COURT. You send them out?

A. If they want them. We tell them to take the chute with them.

By Mr. GLENN:

Q. Do drivers then have the right to decide whether or not they want to use a chute in unloading?

A. That is right.

Mr. KING. I object to that question, how this man knows if the drivers have the right.

Mr. GLENN. I will ask him that. Do you request them to use chutes when requests come to you for them to use chutes?

A. I tell them about it.

The COURT. They take your chutes. The chutes belong to you?

A. The chutes belong to us, yes.

By Mr. GLENN:

Q. Do drivers either agree to use them or refuse to use them?

A. They have refused on many occasions a chute. Either it was too hard, or too long to get in. There isn't over one per cent of the places where they have to use a chute.

Q. You mean one per cent of the deliveries?

A. Of all the deliveries.

Q. And on that one per cent, when such requests come in, do the drivers always take chutes even though you tell them the customers request them?

38 A. No, sir.

The COURT. He said no, they don't.

By Mr. GLENN:

Q. Do you make any attempt to tell them to use the chute if the customer has requested it and the driver objects?

A. I tell them.

Q. You tell them the customer wants it?

A. That the customer wanted to use a chute. It would be easier for their place.

Q. That isn't my question, Mr. Silk.

Mr. KING. We object to the question because it is leading.

Mr. GLENN. I asked him if he made any attempt to tell them to use a chute if the customer wants it.

A. I don't make them use a chute if they don't want to. I tell them. That is all. It would be easier for them to unload.

Q. In the case where requests are made for chutes, do they always take them when a request comes in?

A. No, sir; they have refused to take the order to make a delivery. They take along a chute where it is a hard place.

Q. Mr. Silk, if the men are at your yard between deliveries, do you require them to do any work for you around the yard while they are waiting for another delivery?

A. I do not.

Q. What do they do while they are waiting for another delivery?

A. Some of them read mystery stories, they play cards, and some of them just sit around and talk. There is plenty of reading if they want to use it.

Q. Is there anything required of them so far as you are concerned during the time they are at your yard waiting for another delivery?

A. None whatever.

The COURT. How many men are generally on tap there awaiting orders?

A. That varies, Your Honor. At the present time we have, I believe, eight.

39 The COURT. How many?

A. Eight. We used to have as much as fifteen.

The COURT: Sitting around there waiting?

A. That is right.

By Mr. GLENN:

Q. That many waiting, or that many truckers who worked?

A. They may, although they are waiting around. Some of them actually go out.

Q. You have eight on the list?

A. Yes.

The COURT. He has answered the question. He said there were eight generally around there.

Mr. GLENN. All right.

The COURT. You furnish them a place to wait?

A. Yes, sir.

The COURT. Do you give them lockers or anything like that?

A. No.

The COURT. Rest room service?

A. There is a rest room.

The COURT. I think you have your story pretty well complete.

Mr. GLENN. I was checking on some notes to see if I have it all covered. Mr. Silk, as far as you are concerned, are the men required to belong to any organization of any kind?

A. Not in the least.

The COURT. Do they have a union?

A. Of their own?

The COURT. Yes.

A. No, sir.

By Mr. GLENN:

Q. Do you know whether or not these men have chauffeur's licenses under the Kansas Driver's Law?

40 A. They do not.

Q. Do you make any attempt to obtain such licenses for them?

A. No, sir; I do not.

The COURT. Do they pay a license tax on their trucks?

A. Yes, Your Honor.

The COURT. Do they pay that?

A. I suppose so. I couldn't say.

The COURT. Do you pay any of the tax either directly or indirectly?

A. No, sir; I do not.

Cross-examination by Mr. KING:

Q. Mr. Silk, I believe you say you have been in business about twenty-six years in Topeka in the coal business?

A. That is right.

Q. Have you always operated about the same way you now operate, that is with hauling the coal by truckers?

A. Since 1922.

Q. Since 1922?

A. Yes, sir.

Q. When you started this did you run an ad in the paper that you wanted drivers?

A. We do that on occasion. We have had ads like in years ago, truckers wanted and coal haulers.

Q. At the time you first started in on this relationship?

A. Back in 1922?

Q. Yes, then.

Mr. GLENN. I object as incompetent, irrelevant and immaterial. That is fourteen years before the time involved in this case.

By Mr. KING:

Q. All right, do you operate the same now as you did when you started in 1922?

A. As far as I know, we do.

Q. When the truckers first came in what was said when the truckers first came in to your place? How did they know you wanted them, had coal to haul?

41 A. Well, to give you a better picture or better describe my set-up so you will know. In 1922 I went into business for myself. Before that time I was with another concern, and when I left a number of haulers that worked at the other place came to work for me at that time. They came to work for us, and as the business increased they would recommend their friends or tell other haulers to come and haul for us, and that is about how it grew up that way.

Q. And sometimes you ran ads for haulers?

A. We ran an ad as far as I can remember once.

Q. For instance when a trucker came in to you, and these men who were truckers came in to you, what was said when they first came and asked you if they could go to work?

A. What was said?

Q. Yes, what sort of arrangements did you make with them?

A. We paid so much a ton, and if you want to haul you can haul. That is all there is, and we don't hire anyone to haul coal unless we know something about them. As I said, most of these men were recommended by the haulers who were hauling.

Q. Do you tell them of any of the things that you want done? For instance, in making a delivery, whether they should go to the front door or what they should do when they go out to make deliveries?

A. No, sir; we don't tell them anything.

Q. Leave that entirely to them?

A. To them, that is right.

Q. Don't tell them not to go to the front door?

A. No, sir.

Q. What about making collections?

A. If it is a C. O. D. order, we tell them.

Q. Do they make C. O. D. collections?

A. If they are to, they are stamped.

Q. Mr. Silk, as I understand now, you have one office there on your property, is that true? You have an office on your property?

A. That is right.

Q. Then there is a scale next to that office?

A. That is right.

42 Q. Then there is a separate building there where these truckers stay?

A. That is right.

Q. Between the orders; is that correct?

A. Yes, sir.

Q. Is there some sort of a bell arrangement between your office and their office?

A. Yes, sir.

Q. What is the purpose of that?

A. To ring for the next man.

Q. Who installed it; did you have it installed?

A. I believe we did.

Q. How long has it been there?

A. I couldn't tell you.

Q. You did have it installed there?

A. That is right.

Q. In other words, if I understand correctly that someone orders coal, and they call you on the phone; is that the general way?

A. Yes.

Q. And you take their order and ring the bell which rings in the truckers place?

A. Yes, sir.

Q. Where they stay, and then one of the truckers come into your office?

A. That is right.

Q. You are pretty busy in the office, are you, Mr. Silk?

A. Yes.

Q. As a general rule?

A. Yes.

Q. Is that the reason why, Mr. Silk, you let the truckers determine who was next up, because you thought that was something you could get rid of, or what is the reason for letting them determine who was the next one?

A. I believe that was the suggestion of making the equitable way, of getting their turn.

Q. So you let them do it because you did not want to be bothered?

A. That is right.

Q. Told them they could make all their arrangements among themselves?

43 A. That is right.

Q. When the trucker who is next up comes into your building, he walks in and receives some sort of instructions, or you tell him what to do; is that right?

A. We tell him what to get, how many tons.

Q. Do you give him anything in writing?

A. No, sir.

Q. Don't you give him a ticket?

A. To make a delivery.

Q. In other words, when an order comes in, do you make an original and a copy of an order on a ticket?

A. That is right.

Q. One of those tickets goes to the trucker; is that right?

A. That is right.

Q. On the tickets you always state the type of coal which is to be hauled?

A. I do.

Q. You write that on the ticket?

A. That is right.

Q. And the amount?

A. That is right.

Q. What about the time that the coal is to be delivered? Do you write when it is to be delivered?

A. Only in cases for the convenience of the customer.

Q. In other words, where the customer wants it a certain time, you write it down there then?

A. Yes, otherwise it is left open.

Q. Isn't it also true, Mr. Silk, that you write on those the size of the chute that the trucker is to carry with them?

A. That is for their own information.

Q. All right, but you write that on the ticket, the kind and size of chute the trucker is to take with him?

A. It is already there. When a customer calls for his order and he says take a chute, we will ask him what length, what size of chute. He will say eight, ten, twelve, sixteen feet, whatever

it takes, and when the order is written up, that information is put on the ticket for the driver to take.

Q. In the same way, do you write on the ticket, do you write whether his coal is to be sprayed down before delivery?

A. Yes, sir.

44 Q. Do you write down on the ticket if the coal is to be stacked at the place of delivery?

A. That is right.

Q. Do you write down on the ticket if the coal is to be screened before putting in the truck for delivery?

A. All coal is screened except steam coal.

Q. But does any of that go on the ticket?

A. It may, but I couldn't say for sure, but all domestic coal is screened.

Q. Is there anything else that goes on those tickets, so we will have a complete understanding?

A. I couldn't say what else would go on. It is a printed form.

Q. The amount of charge, of course?

A. That is right.

Q. And whether they are or whether they are not to make collection?

A. If the order is a charge account, it is marked "okay."

Q. Mr. Silk, what of the people you deliver coal to; are they always good pay?

A. It does not make any difference in this case, please.

Mr. GLENN. I object as incompetent, irrelevant, and immaterial.

The COURT. What is the question?

(Last question read by the reporter as follows:)

Mr. GLENN. Whether his customers are good pay. I don't think that is material.

Mr. KING. What I want to go to is to ask is the trucker ever responsible for failure to pay a bill?

A. The delivery man has never paid a coal bill yet.

The COURT. Do you expect them to?

A. Never tried to, your Honor.

The COURT. You never ask them to?

A. No.

The COURT. All right.

45 Mr. KING. One more question if I may on that. Have you at times though instructed the truck drivers not to deliver the coal until it was collected for first?

A. That is right.

Q. Do the truckers weigh in when they first come in the morning, Mr. Silk?

A. They do.

Q. Was that at your suggestion or direction?

A. There is no suggestion. They have to give people honest weight and give them what they sell them.

The COURT. Is there a city ordinance?

A. Yes, your Honor.

The COURT. Providing you weigh coal. What is that?

A. The trucks should be weighed at least once a day, but we weigh them at least twice a day. In stormy weather, we weigh every load.

The COURT. When do you put water on the coal?

A. That is done after it is weighed.

By Mr. KING:

Q. Mr. Silk, in other words you do furnish the ticket?

A. Yes.

Q. You furnish the coal chutes?

A. That is right, to the extent that I stated before, about one percent.

Q. About how many of them do you have?

A. Oh, I couldn't tell you.

Q. Twelve.

A. Maybe twelve, and maybe more. Different sizes. They break up so many of them in the yard.

The COURT. How many trucks do you send out a day?

A. Oh, Your Honor, it has been varied from perhaps days we have made as high as, delivered as high as 250 tons a day there.

The COURT. How many times does the trucks go out?

A. One individual trucker?

The COURT. No, I mean altogether.

46 A. All together, we perhaps send from fifty to one hundred loads a day.

The COURT. You send out fifty to one hundred of these truckers a day?

A. That is loads.

The COURT. What part of the year is that; how often does that take place?

A. The last 2 years have been practically the whole year round, Your Honor, but before the emergency it was only about six or seven months in the year.

The COURT. In other words, you call out fifty to one hundred trucks a day?

A. No, no. Perhaps I didn't make myself clear.

The COURT. How many times do the truckers go out from your place?

A. Each trucker?

The COURT. No, all together.

A. All together, they make from fifty to one hundred deliveries a day.

The Court. All right.

By Mr. King:

Q. Mr. Silk, they have to use wheelbarrows at the place of delivery, do they not?

A. Yes, sir.

Q. What about the planks, do you furnish the planks for them to use for their running the wheelbarrows on?

A. The planks are always there in the yard. We use them for the coal bins, and the drivers cannot carry planks with *ever* load. There would be a lumber yard.

Q. Do you furnish wheelbarrows and the planks?

A. The wheelbarrows are theirs, your Honor. They own the wheelbarrows.

By Mr. King:

Q. Mr. Silk, in about 1936, you had about twelve signs made with Silk Coal Company on them; is that true?

A. I don't recall it.

Q. You don't know the year you had those made?

47 The Court. Had what made?

Mr. King. I think we can bring this out. Mr. Silk had new signs made with Silk Coal Company on them for the purpose of having the truckers use them on their trucks.

A. That was years bac .

Q. Were those signs n ade in the year 1946?

A. I couldn't tell you.

Q. How many signs did you have made?

A. I don't know; don't recall.

The Court. He said there wasn't any.

Mr. King. Well, I can bring it out with another witness, I think. You also furnish the screens where they screen the coal?

A. They are ours.

Q. And the picks?

A. The ones in the yard are ours. Some of them have their own.

Q. Truck drivers don't use those very often though?

A. No.

Q. I see. Awhile ago you said that you did not require them to report at any particular time any particular day?

A. That is right.

Q. How were you ever sure that you would have any truck drivers on hand?

A. I am not sure.

Q. You are not sure.
A. No, sir.
Q. Have you ever been in the situation where you did not have them on hand?
A. I am embarrassed every day.
Q. You are?
A. Yes, sir.
Q. In other words, there has been a morning when no truck drivers ever showed up?
A. There is always someone shows up.
Q. You never know who it is going to be?
A. No, sir; I do not.
The COURT. What do you do if you come down to the office and have a lot of orders to get out?
48 A. I will cite you a case.
The COURT. No; just answer the question. Do you wait until they come in?
A. Yes, sir.

By Mr. KING:

Q. As a general rule, Mr. Silk, you have about six or eight truck drivers who show up there about seven o'clock every morning between September and April of the year; is that true?
A. No; it is not true. And as to the time, there is no time set, but they know this. When it is light they can see to load and start loading as soon as they start coming in, but at 6:30 or a quarter till seven or quarter to eight, it depends on the time of the year, there is no set time as to when they want to come. They come in at all hours.
Q. Have you ever had any complaints of any customers, Mr. Silk, as to the way that some of the coal was delivered?
A. Yes, sir.
Q. What were their complaints; what did they mainly consist of?
A. They didn't do a good job, and they didn't clean up.
Q. Ran off, got over in the yard?
A. That is right.
Q. Broke down the clothesline?
A. Might have been.
Q. Ever have any complaints of that kind?
A. I think some.
Q. Backing into the garage or the building?
A. It might be.
Q. What did you do, as far as telling the truck driver about it?

A. Well, we just tell them people called in and made a complaint. That is all we can do.

Q. Do you tell them to be careful?

A. That is a natural way of doing business.

By the COURT:

Q. You wanted to know whether he fired them or not, or whether he sent them back out there, what his disposition of them is?

By Mr. KING:

Q. Do you ever send them back out to clean up?

49 A. Well, I don't recall of any cases ever we have had, but if it has to be cleaned up we will send someone from the yard to clean up. We may have sent some of them to clean up.

Q. If they damage anything, who pays for the damages?

A. We pay for it.

Q. You pay for it?

A. Yes.

Q. You bill it, charge it, against the man?

A. No, sir; we do not.

Q. When a man who is hauling coal needs a helper, does he come to you and ask if he can hire a helper?

A. No, sir; he did not ask me anything.

Q. He did not ask you anything?

A. If they got a bad place, and they needed help to get the coal in, we would have them call the office, and they had a helper of their own and they could do it.

Q. Have you ever fired anyone, Mr. Silk?

A. As far as I can recall, I can't recall any just now. What do you think, a good man should be fired?

Q. Why?

A. Why?

Mr. GLENN. To which we object. It never happened, and it never has, and it hasn't any bearing.

The COURT. It never happened anyway.

By Mr. KING:

Q. Mr. Silk; isn't it true that at any time that the men were working and wanted to leave for any reason, that they usually came to your office and asked you for permission to go; isn't that true?

A. They did not.

Q. They did not?

A. No, sir.

Q. Mr. Silk, you carry insurance on these trucks?

A. They do now.

Q. Is it or isn't it true that when these truckers came in that you would say to them that they must carry insurance before they could haul for you? Answer if it is or is not true.

A. Yes.

Q. It is true?

A. Yes.

50 Q. All right, just a minute. Just answer the question, please. Now you told them they could not haul for you until they had insurance on their trucks?

A. That is right.

Q. Now, is it not true that you see that the premiums are paid and deducted, those premiums are deducted from their pay on most of the men who work for you?

A. I know that is not true. Here is the case to make it easier on them.

The COURT. Just answer the questions.

By Mr. KING:

Q. To make it easier on them?

A. Instead of them paying out one lump sum which most of them could not do, we have been paying the premium, and it is deducted five cents a ton from the premium that has been paid, and if there is anything above that it is refunded back to them.

Q. Do you usually pay your drivers once a week?

A. We usually pay our drivers once a week, but they can draw every time they want to, every load every day. It is up to them.

The COURT. How about their license? Do you pay that?

A. No, sir; I do not, your Honor.

The COURT. I mean do you deduct it?

A. No, sir; they pay themselves. I have nothing to do with that.

The COURT. How many licenses do they have to have, a city and state?

A. City and state; a driver's license. I don't know. I have no power.

By Mr. KING:

Q. Mr. Silk, awhile ago you said you were the one—that the truck drivers are the ones that set the route they could take, and that they are the ones that designate them. Have you ever gone on any trucks with them to unload coal?

A. Yes, sir.

Q. How do you know they are the ones that choose their own route?

51 A. I don't know.

Q. Mr. Silk, you testified awhile ago that some of these truckers have refused at various times to make or to take a load of coal when handed a ticket; is that true?

A. I believe the drivers will testify to that themselves. When they come in, we tell them what they are to get and what they are to load, and they have refused to take it.

A. All right, who have refused?

A. Who?

Q. Yes.

A. A good many of them. You want the names?

Q. Yes, I want the names.

A. Kirby has refused, and Dave Chesler has refused.

Q. Is he here today?

A. Yes, Chesler. Ernest Thompson has refused, and I believe Joe Heberling has refused. In fact, most every one of them has refused to make a delivery that they didn't care to go.

Q. Anyone else besides those four names?

A. Well, maybe more.

The COURT. Did they give any reason?

A. Many times they don't like the customer. They don't like the place to go to. They don't like the method to go to the place, for reasons of their own, your Honor.

By Mr. KING:

Q. Mr. Silk, awhile ago you said these truckers also haul for other coal dealers in town?

A. That is right.

Q. Have you ever seen them hauling?

A. I have seen it.

Q. You have seen it?

The COURT. Any of them that hang around other yards other than yours?

A. I couldn't tell you. I don't know.

The COURT. Are they away from your yard a sufficient time in order that they could be hauling for others?

A. Yes, your Honor.

By Mr. KING:

Q. Is the busy season of your business from April to September, or September to April?

52 A. Up until two years ago it was.

Q. Up to two years ago. The years involved here it was, from 1936 to 1939?

A. Yes.

The COURT. Inclusive?

Mr. KING. Inclusive, maybe September for one quarter.

Mr. GLENN. I think it is a part of 1936 and runs on up to the early part of 1940.

Mr. KING. I think that is right. During this period of from September to April, Mr. Silk, isn't it true that your haulers were usually only hauling for you and not for any other coal company?

A. Well, they hauled most of them for us, and they didn't haul for others, because we pay more, because our scale is higher than any yard in town. I think that will answer the question. Our scale has been the highest in town for years, and naturally it is to their benefit to be there. It is to their profit.

Q. In other words, they usually stick to you from September to April?

A. To their benefit.

Q. You know as a matter of fact, Mr. Silk, if their employment with you between September and April of the years involved here, 1936 to 1940, that was their main source of income?

Mr. GLENN. To which I object. He says their employment with him. That is the question involved.

Mr. KING. All right, their relationship.

The COURT. If any trucker applies to you to haul, do you refuse to let him haul?

A. No sir; I haven't.

The COURT. You take on any men, any man who comes along with a truck?

A. If he looks good to me.

The COURT. Have you ever refused anybody the right to haul your coal?

53 A. We have not hired some where we could hire.

The COURT. For what reason do you turn them down?

A. For different reasons. We pay our men more than the rest.

The COURT. Suppose a man, take the case of a man you refused to let haul. What do you tell him?

A. We have enough haulers.

The COURT. You had enough. That is all.

By Mr. KING:

Q. You said awhile ago, Mr. Silk, it was not necessary for the men to report back to the yard after they had made deliveries?

A. That still holds good.

Q. If they make a C. O. D. collection, were they not required to report back to the yard and return the money?

A. No, sir.

Q. They were not?

A. No, sir.

Q. How were you ever assured you were going to get the money?

A. We have all lost on one hauler.

Q. Isn't it true, Mr. Silk, if they didn't come back the same day, they would be there the next morning or there in the next day or two ready to haul?

A. Well, if they are going to haul, they will surely show up. After all, they are a bunch of honest men.

Q. How do you know your chutes, I mean the chute hauls only comprise about one percent of your total amount? Have you ever figured out?

A. No, but I could figure. That is by their own statement.

Mr. KINA. All right. I believe that is all.

Redirect examination by Mr. GLENN:

Q. Mr. Silk, I want to go into a little more questioning about the unloaders. I don't believe I went into that. How do you have your coal unloaded from the freight cars into your yard?

A. The car is set in the yard and it is unloaded either at the bank or on the ground.

Q. Who sets the car?

A. The Missouri Pacific.

Q. The railroad company?

A. That is right.

Q. Then on what basis is that coal unloaded?

A. We pay them by the ton.

Q. What is that?

A. We pay them by the ton, but there have been cases where there was a bad car, or a hard car to unload and they didn't want to unload by the ton because they couldn't make anything they have said we will unload it by the hour in order to get it off, which will make them the most money, but ordinarily it is paid by the ton.

Q. In the usual case how is it paid?

A. By the ton.

Q. Are there any hours fixed by you when that work it to be done?

A. There is not.

Q. What tools do they need to unload a car of coal from the car into your yard?

A. They have to have a shovel, and if it is a certain kind of coal they have to use a chute to get it out of the car and unload it.

The COURT. They unload it by the hour, a difficult car?

A. If it is a difficult car to unload, otherwise by the ton.

Q. That is on there—by their own request. I believe I asked you which way it was usually done in most cases?

A. Most other cases is by the ton.

Q. Who owns the shovels or forks that they use in unloading?
A. The fellow who unloads; they use their own shovels.
Q. You don't furnish them?
A. No, we furnish them chutes. Those are ours.
Q. Do they need a pick to unload or axes?
A. Well hardly, unless the lumps are too big, can't handle them.
Q. What instructions do you give them about the unloading of the coal?
55 A. Haul the coal, and unload it at a certain place.
The COURT. How many different kinds of coal do you have?
A. Twenty-one.
Q. Just to give the Court some idea of the way it is done. How much time does it usually take to unload a car of coal?
A. A good man can unload a forty-ton car in a day.
Q. Do you tell him when to begin work?
A. No, I do not.
Q. Do you tell him when to quit work?
A. I do not.
Q. Do you tell him when to go to lunch?
A. I do not.
Q. Are there any instructions which you give these men except to unload the car and where to throw it?
A. Not to break the coal more than they can help it.
Q. Now, how do you obtain men for this kind of work, Mr. Silk?
A. They come and go.
Q. Your men, they just drop in at the yard?
A. That is right; there is always plenty.
The COURT. A group of them there like the truckers?
A. Not exactly that scale; no.
Q. Are a good many of them floaters?
A. A lot of them are floaters, and some of them have unloaded for different yards.
Q. The same men who unload for you then unload at other yards around town?
A. That is right.
Q. How do you get them from the other yards if you need them?
A. They just come down looking for work, and ask if we have any car to unload.
Q. How many days time are you allowed to unload a car, before demurrage starts on it?
A. Forty-eight hours.
The COURT. You know in advance when a car of coal is coming in.

56 A. We have a shipping notice and they notify us when the car gets in town.

Q. How much notice have you when it is spotted at your yard?

A. It is unloaded forty-eight hours.

The COURT. They give you forty-eight hours notice before it is switched in your yard?

A. We have forty-eight hours to unload it.

The COURT. I mean what time, when a car comes in when you first know the coal is there to be unloaded, when it is spotted in your yard or before?

A. If my yard is in shape they can set it. It starts from the time it is set.

The COURT. When does the car actually come down?

A. Well, if I may explain.

The COURT. Go ahead.

A. (Continuing.) The car comes and our yard is full, the time starts from eight o'clock in the morning when it should have been spotted. If it is, we have forty-eight hours from that time. If the car comes in and they couldn't start in the yard, the forty-eight started from the time they called.

Q. Then during the car when your track is empty?

A. That is right. That is the instructions.

Mr. GLENN. I believe that is all.

Re-cross-examination by Mr. KING:

Q. Mr. Silk, did you have a bookkeeper there by the name of Mr. Taylor that used to be with you during the years between 1936 and 1940?

A. That is right.

Q. Then do you have a yard foreman?

A. That is right.

Q. Who was your yard foreman during 1936, 1937, 1938, and 1939?

57 A. I can't tell you the years, but it was Mr. Carl Vitto. He was the yard foreman.

Mr. GLENN. There is no question about him, about the yard foreman.

Mr. KING. No; I am not introducing it——

Mr. GLENN. (interrupting). We admit the office man and the yard foreman were regular employees on a salary.

By Mr. KING:

Q. Do you have anyone else regularly employed and working out in the yard?

A. A watchman. We have a night watchman.

Q. A night watchman?

The COURT. These men, do they ever leave their trucks there over night; the truckers?

A. As far as I know they do not.

The COURT. Do you allow them to leave their trucks there?

A. If they wanted to, they could. It is not open.

Q. Now, do you always have some employees that you call yard men, who work under your yard foreman?

A. Yard men, what do you mean? He is in the yard?

Q. Yes.

A. Well, if there is work to be done, it could be called as such.

Q. Well, do you have regular people to do that type of work?

A. Not necessarily.

Q. Who work in the yard?

A. Not necessarily.

Q. How many employees do you have besides Mr. Taylor and Mr. Vitto and these truckers and these unloaders? Do you employ anyone else than them for any purpose?

A. No; except the night watchman, which we admit is a regular employee.

The COURT. You have no other employees than them for any purpose?

A. No.

58 By Mr. KING:

Q. What are the duties of your yard foreman?

A. To see that everything is kept in shape, the coal is unloaded; that the orders were gotten out, didn't run over piles of coal.

Q. Some of these men who were unloaders worked right under his direction and supervision: is that true, Mr. Silk?

A. They did what he told them to do.

Q. Wasn't he the yard foreman who directed them in their duties?

A. Oh, I don't think so. They were told what to unload, where to unload it. He supervised.

Q. Just a minute. I think I know what is wrong. Some car loads of coal that came in were unloaded on about a ten-cent-a-ton basis; is that true?

A. We had some types of coal.

Q. All right, some of it was unloaded on a so much per ton basis?

A. That is right.

Q. Mr. Irvia Wall contracted to unload those cars for a number of years for you; is that true?

A. Not that I know of. I can't recall it if he has. He is our night watchman.

Q. Well, I have been told.

A. He is at present the yard foreman. There is no question about it.

The COURT. How were the trucks loaded in the yard to get the coal trucked out? The truckers load them themselves?

A. They load them themselves.

The COURT. They shovel the coal off the pile?

A. If I may I will explain. They unload by hand themselves. They load by hand wherever it is possible. We have an electric conveyor to make it easier for them to load the coal and don't charge them anything to use it, just to get it out that way.

The COURT. You furnish an electric conveyor?

A. That is right, without charge, and that is to expedite deliveries.

59 By Mr. KING:

Q. Mr. Silk, you say there are two types of unloading. Go ahead and explain that.

The COURT. He has done that.

A. I have done that. One is by the machine, a certain amount by per ton, and the other by hand.

Q. Do you have certain people, which we will call yard man, who work under your yard foreman's direction on an hourly basis to help unload coal?

A. As far as I know I can't recall it. I can't recall it now.

Q. In other words, except for what you said a while ago when you said you had a difficult car to unload, the parties were paid by the hour, and otherwise it was unloaded on a per tonnage basis?

A. I don't think you get a correct picture of it.

Q. No, I don't.

A. If the yard foreman needed help, couldn't get the yard maintained, couldn't get the orders out if they wanted them, there were people given him, or help given him to clean up and help them get out. He could put on extra help.

Q. He could put on extra help?

A. That is right.

Q. And they were paid on the hourly basis?

A. They were paid on the hourly basis just for that kind of work.

Mr. GLENN. Is there any claim here made for those men on an hourly basis; are you claiming them to be exempt?

A. I am not claiming anything. What do you mean?

Mr. GLENN. The men whom you just testified that they are not ordinary employees.

Q. They are not ordinary employees?

A. No.

Mr. GLENN. All right.

A. They come and go.

The COURT. Is that all this witness?

60 Mr. KING. That is all.

Mr. GLENN. That is all.

PAUL TAYLOR, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

Q. Please state your name.

A. Paul Taylor.

Q. Where do you live at this time?

A. Wichita.

Q. What is your business now?

A. I am connected with the Firestone Tire and Rubber Company.

Q. At one time were you employed by Albert Silk in Topeka?

A. Yes, sir.

Q. For what period of time?

A. Thirteen years and eleven months, to be exact.

Mr. KING. If the Court please, the Government moves the exclusion of the witnesses from the room at the present time for the reason that there are interested parties present and there is testimony that will come forth from the witness that will be prejudicial to their reasoning. This is largely a matter of recalling instances that happened some years ago, and they may be greatly influenced by the fact of someone giving testimony who is their boss or superior or who now is.

The COURT. He is not working there now. This doesn't apply to this particular witness?

Mr. KING. For the further reason, if the Court please, there are witnesses who will testify here who are working together.

The COURT. This man isn't one of them. Can you renew your motion at a later time?

61 Mr. KING. All right, thank you.

By Mr. GLENN:

Q. When did you leave the employment of Mr. Silk?

A. May 1, 1943.

Q. During the time you were employed by Mr. Silk, what was the nature of your duties?

A. I was keeping books, taking orders over a telephone.

Q. Were you in the same office room with Mr. Silk?

A. Yes, sir.

Q. As a matter of fact, just for the purpose of the record, there is one large room with two large desks or tables in it, is there not?

A. Yes, sir.

Q. How close was your desk to Mr. Silk's desk?

A. The two desks joined together. We faced each other.

Q. Within hearing distance of each other?

A. Yes, sir.

Q. Are you familiar with the manner or method in which the coal haulers delivered coal there?

A. Yes, sir.

Q. Are you also familiar in a general way with the way in which the coal unloading was done or arranged there?

A. Yes, sir.

Q. Did Mr. Silk own any trucks of his own during the time you were there?

A. No, sir.

Q. State if you know who owned the trucks that were used in delivering coal?

A. The men that were doing the hauling owned their own trucks.

The COURT. What do you call them?

A. Truckers, independent truckers.

By Mr. GLENN:

Q. Were those men required as far as you know to carry the name of the Silk Coal Company or Albert Silk on their trucks?

A. No, sir.

Q. Were they required as far as you know to have the telephone number or address of Albert Silk on their trucks?

A. No, sir.

Q. Did you ever hear Mr. Silk request any of these
62 truckers to carry his name or telephone number or address on the trucks?

A. No, sir.

Q. Mr. Taylor, when a coal order was received, who took the order, who would take the order?

A. Either Mr. Silk or myself.

Q. Then what was done with it when you took the order, what procedure was taken in handling it?

A. It was written up on a ticket. Everything was filled in but the weight of the truck and the driver that was going to take the coal.

Q. Were these drivers requested to report for duty at any particular time of the day?

A. No, sir.

Q. Tell the Court what the actual fact was about the time they were to come.

A. Some of them managed to get there early in the morning because as a rule there were always better orders the first thing

in the morning. Others would show up maybe nine or ten o'clock in the morning. There was no set time. It was there for them to be there.

Q. Were they required or requested to come in every morning?

A. No, sir.

Q. Was there any requirement or request about the time they should leave in the evening?

A. No, sir.

The COURT. No requirement as to hours?

A. That is right, sir.

Q. What arrangement was there if any about who would take a particular order?

A. One of the drivers fixed up a board with a bunch of nails on it. Each man had a check which he had fixed up with his name on it. The top man was the first on for the order. If he didn't want it, he turned it down, and the next man had the chance on it. When the top man took the order he took off his check and put it on the bottom. That was the arrangement between themselves.

Q. Did you or Mr. Silk either have anything to do with working out that plan?

63 A. No, sir.

Q. If a man didn't want it, usually he turned it down. Explain to the Court if a man came in——

A. (Interrupting.) If a man came in in many cases he would ask where the coal was to go to. And if he took it, he had the address and we told him the place, and if he thought it was a place a little harder than some others, he would say he didn't want the order.

Q. Did that actually happen frequently?

A. Yes, sir.

Q. Would you say it happened on the average of once or more a day?

A. I would.

Q. If a man was called in and asked about taking an order and turned it down, what did you do?

A. Ask for the next man to come in.

Q. There was a bell, or buzzer arrangement, as I understand it?

A. Yes, or sometimes that particular driver that was in there would go in there and tell the next man to come in.

Q. Did you have anything to do at all about determining yourself which man would be the next one to come in?

A. No, sir.

The COURT. If a man turned down an order, his name went to the bottom?

A. I couldn't tell you how that worked out, whether they took the check off or not.

By Mr. Glenn:

Q. What reason would they give if any about why they didn't want to take an order?

A. Sometimes they wouldn't give any reason, and other times they would say they didn't want to go to that particular place.

Q. How were these men paid; Mr. Taylor, at what times were they paid?

A. Every week, and they could draw in between times if they wanted to.

Q. As a matter of fact did they draw some in between times?

A. I don't think there was but one or two that didn't draw during the time I was there.

Q. In other words most of them did?

A. That is right.

Q. On what basis were they paid for the hauling?

A. So much per ton.

Q. Did that rate vary some during the years?

A. It did during the period of years; yes. I think it started in—pardon me, do you want the amount?

Q. That is right.

A. I think it started at seventy-five cents a ton. And it raised to eighty-five.

Q. Was that on domestic coal?

A. That is on domestic coal.

Q. Was there a different rate on commercial coal?

A. Yes, sir.

Q. Do you recall what that was?

A. Fifty cents when we started and raised to sixty.

Q. Tell the Court something about this building where you say these men had the board.

A. It used to be our office. His business got so heavy there was too many people in there, such a small place, that we built this new office on the east side of the scale. Then we used that former office for storing some records, had some stokers in there, and the drivers stayed in there when the weather was bad.

Q. Did Mr. Silk furnish shovels for the men?

A. No, sir.

Q. The truckers, did he furnish forks for them?

A. No, sir.

Q. Or wheelbarrows?

A. No, sir.

Q. Do you know who furnished the shovels and the wheelbarrows?

A. The men themselves.

Q. Did Mr. Silk furnish oil and gas for the trucks?

A. No, sir.

Q. Did he furnish tires or repairs for the trucks?

A. No, sir.

Q. Do you know who did furnish those things?

A. As far as I know the individual furnished everything.

Q. You mean for his own truck?

65 A. That is right.

Q. Was there any requirement to your knowledge by Mr. Silk that these men would buy their gas and oil at any particular place?

A. No, sir; they bought wherever they wanted.

Q. Was there any requirement about their buying their tires or having their repairs made to their trucks at any particular place?

A. No, sir.

Q. Was there any allowance made by Mr. Silk for this except the regular rate per ton?

A. No, sir.

Q. Do you have a recollection of days when Mr. Silk did not have enough haulers for taking care of the business?

A. Yes, sir.

Q. Just tell the Court something about that.

A. Well, there was a number of times, there wouldn't be enough drivers to take care of orders. Naturally people would want coal at a certain time, and if they didn't get it, they would call up and cancel the order. That has happened a good many times. If weather conditions weren't pleasant I have seen the drivers many a time turn down orders and stay in the room there where they were, turn down orders and refuse to take orders.

Q. If a driver took an order, was he required to come back to the office after he had delivered the order?

A. No, sir.

Q. As a matter of fact, can you tell the jury whether there were times when drivers did not return after they had taken deliveries?

A. Will you please restate that?

Q. I didn't get it in very good language. Do you know of any instances when the drivers did not return after they had made deliveries?

A. Yes, sir.

Q. Just explain to the Court please.

A. Well, they would leave with an order sometimes early in the afternoon. Maybe they would take a notion to go hunting or something, and they didn't return at all.

Q. Do you recall the time when some of the men went to Liberal, Kansas?

66 A. Yes, sir.

Q. Tell the Court about that.

A. Well, they just left and went to Liberal. That is about all I can tell you about it.

Q. Was there any arrangement made as far as you know with Mr. Silk or anyone else in the office for them to be gone?

A. No, sir.

Q. Did they ask anybody's consent to be gone?

A. No, sir.

Q. Or did you know that they were leaving in advance of the time that they actually left?

A. No, sir.

The COURT. What did they go to Liberal, Kansas, for?

A. I couldn't tell you that.

Q. Do you know whether these men hauled for other people during the time they hauled for Mr. Silk.

A. Yes, sir.

Q. Tell the Court about that.

A. Well, practically all of them have hauled coal for other concerns there. A couple of them in particular. Most of them have hauled grain, houshold goods and some stock, just doing a general line of hauling, whatever they could pick up.

Q. Have you received telephone calls at Mr. Silk's office for men to come out and haul other things for other people?

A. Yes, sir.

Q. Tell the Court about that.

A. Well, people would call up and ask for such and such a man. In many cases we just call him and let him answer the phone, and he went out and did the work, whatever was to be done.

The COURT. Will all this testimony be cumulative?

Mr. GLENN. There are or may be come other points. When the men were not busy working on deliveries, were they required to do any work around the yard?

A. No, sir.

Q. Do you know what they did when they were not hauling?

67 A. Yes. I would be in the room a number of times. They played cards and did things like that.

Q. Do you have knowledge of instances where some of the men went hunting instead of doing their hauling?

A. Yes, sir.

Q. Tell the Court about that.

A. Well, I can recall two particular men that went hunting a number of different times together, Leonard Gray and George Kirby. They left the job and went hunting.

Q. Would they make any arrangements in advance to be off?

A. No, sir.

Q. Or about how long they would be gone?

A. No, sir.

Q. How would you find out then about what they did?

A. As a rule, they would always tell us the next day.

The COURT. What did they hunt for; quail out in there?

A. Yes, sir; a little bit of everything.

By Mr. GLENN:

Q. Were there any written contracts between the men and Mr. Silk?

A. No, sir.

Q. If there had been, you would have known?

A. Yes, sir.

Q. Were there any instances, Mr. Taylor, to your knowledge, where men who owned their own trucks, would sometimes send other men to drive the trucks for them?

A. Yes, sir; that has happened.

Q. Tell the Court about that.

A. Well, one man went to work in the auditorium, at the auditorium, and he sent another man to drive his truck. I can't tell you his name. There have been instances where some of the men have been ill and sent other men to drive their trucks. I couldn't name the particular man right at present.

Q. But you do know it happened?

A. Yes, sir.

Q. Anything else?

A. Not that I recall right now.

Q. As far as you know who bought the license tags for the trucks?

68 A. The independent owners of the trucks.

Q. Did Mr. Silk to your knowledge ever buy any of those tags?

A. No, sir.

Q. You said a moment ago that some of these truckers hauled for the other coal dealers. Can you name the ones that hauled for others that you know about?

A. They have hauled for the Central Coal Company, H. Morton White Coal Company, Morris Coal Company, and some of them have hauled direct from the mines.

Q. You mean for other dealers or individuals?

A. Well, both.

Q. If a man, a helper was needed, what arrangement did he make to get a helper?

A. He got his helper himself.

Q. If a man got his helper, each man got his own helper if he needed one?

A. That is right.

Q. There has been some testimony, Mr. Taylor, about the use of chutes. About what percentage of the orders required chutes?

A. I would say less than one percent.

Q. At times chutes would be required, then would the truckers use them?

A. They might in some cases. I know of cases where chutes were requested to be used where they weren't used.

Q. Would that happen occasionally?

A. Oh, yes.

Q. No: as to unloaders, would you tell the arrangement which Mr. Silk had for the unloading of coal from the cars into the yard?

A. Men were unloading it, and at a given rate per ton of coal.

Q. Who furnished the equipment they needed?

A. They furnished their equipment.

Q. Who set the hours they would work?

A. They worked their own hours.

Q. What instructions were given, if any, to these men about what they would do in unloading the coal?

A. The only instructions I know was to put the coal at a certain place and to unload it as quickly as possible.

69 Q. Who carried the insurance, if you know, on these trucks?

A. The individual owners of them.

Q. I believe that is all. No; pardon me a moment. Do you know whether or not there was any state law or city law which required that insurance?

A. The state law required them to carry that insurance.

Q. That is your understanding of it?

A. That is right.

Cross-examination by Mr. Fisher;

Q. Mr. Taylor, how long did you say that you were with Mr. Silk?

A. Thirteen years and eleven months.

Q. What can you say about the regularity of these men who appear each morning to do the trucking for the company?

A. As to the time they get there?

Q. No; as to whether the same men appeared? Isn't it true that a great number of men come pretty regularly for hauling?

A. No; they come regularly, but there was——

Q. (Interrupting.) But the same men would show up day after day for a long period over a period of years?

A. That is right.

Q. Quite a number of them. How many were there of them at that time on your list?

A. Oh, I would say half a dozen.

Q. You could always count on men being there in the morning?

A. No; we did not have no way of knowing whether they would be there or not.

Q. These men would show up day after day for years, you said.

Mr. GLENN. If the Court please, that is repetition. He has asked that question.

Mr. FISHER. All right.

The COURT. When you went down every morning, you always knew that some of these men would be there?

70 A. No; we didn't know for sure.

The COURT. You cannot count on them?

A. No.

The COURT. You knew when you went down in the morning, you knew there would be some men there to haul?

A. Yes; we thought there would be.

By Mr. FISHER:

Q. When a man reported from this place where they stayed to take out, go out on a trip, was that man never turned down?

A. As far as an order?

Q. On a particular trip.

A. To my knowledge I can't recall any.

Q. You mean you always sent out the man who reported, is that what you mean to say?

A. As far as I can remember we have, unless a customer might happen to ask for a particular person.

Q. A customer often did that, didn't they?

A. They have; yes.

Q. Isn't it a common thing for them to do that?

A. No, not awfully common. They have asked for it.

Q. Then when a man on the list showed up, what did you do, if he wasn't the man that was requested?

A. We would give him a different order.

Q. A different order, but you sent the next man out on this trip for which you had rung the bell?

A. I have you mixed up a little now.

Q. Do you mean if the man that the customer had asked to bring the coal, how did you get him, just tell us that?

A. I would ring the bell, and the next one would come in, the one that was on top. If we didn't have an order we told him that we had an order for this particular man.

Q. Then what did you do with the man that appeared?

A. If we didn't have an order, he went back and waited for his turn.

Q. You mean if you didn't have another order, a second one?

A. That is right.

Q. You had a number of orders at a time often, didn't you, when you rang the bell for the yard man, the drivers?

71 A. Yes, sir.

Q. Did you do the assigning then?

A. No, sir.

Q. Who did the assigning?

A. Mr. Silk gave the orders.

Q. It was given by Mr. Silk or someone working for him?

A. Yes.

Q. If you had two orders come in at one time, Mr. Silk would pick the men to go on each one?

A. No; we would give them the order, and most cases he would say like, "I have got two of them going such and such a place, three of them going here," and let them pick their orders.

Q. Call in one of them at a time?

A. No; as a rule one man came in.

Q. One man came in at a time and he would let him pick the place?

A. Yes.

Q. Then the next man for the next order?

A. He would have his choice.

Q. And you rang the bell again?

A. That is right.

Q. If there was a third order, you rang the bell again?

A. That is right.

Q. And you sent him out on whatever was left?

A. That is right, if he wanted it, if he didn't he refused the order.

Q. Did you have drivers that weren't satisfactory for anything?

Mr. GLENN. I object to the form of the question.

The COURT. I suppose every business has hired men they have to let go.

Mr. FISHER. That is what I was going to ask him myself.

The COURT. You may assume that would be the case. I don't think it is necessary to go into it, do you?

Mr. FISHER. I was just going to ask him if he didn't have to let drivers go occasionally.

The COURT. Did you ever discharge anybody?

A. No, sir.

72 By Mr. FISHER:

Q. There was never any driver so unsatisfactory you had to let him go?

Mr. GLENN. I object to the form of the question.

Mr. FISHER. I think that is proper cross-examination.

The COURT. Answer the question.

A. No, sir; as far as I know there was never a man released.

By Mr. FISHER:

Q. A man was never discharged by the company for anything while you were there?

A. As far as I know there never was.

Q. What changes occurred with respect to men quitting and starting again, or otherwise coming in? That was a common thing, was it?

A. To the individual quitting and starting?

Q. Yes.

A. Yes; quite often.

Q. Was there a considerable turn-over or not?

A. Oh, we had quite a few different men during the time I was there.

Q. Men would often quit?

A. Yes, they do.

Q. Was it a common thing for a man to report to you, for men to report to you when they were staying away from work or quitting work during the day?

A. No, sir.

Q. It was not?

A. No, sir.

Q. None of the men made a practice of reporting to you at that time?

A. No, sir; it has happened. Some of them have said they would be gone, but there wasn't any common practice.

Mr. FISHER. That is all.

Mr. GLENN. That is all.

CLAYTON OLDHAM, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

73 Direct examination by Mr. GLENN:

Q. Your Honor, he is no longer employed there. State your name.

A. Clayton Oldham.
Q. Where do you live?
A. Topeka, Kansas.
Q. Where are you now employed?
A. Santa Fe.
Q. How long have you been employed at the Santa Fe?
A. Two years with the Santa Fe Railroad; two years and two months.
Q. Back several years ago what were you doing?
A. Trucking.
Q. Did you do any trucking for Albert Silk or the Silk Coal Company?
A. Yes, sir.
Q. Who owned the truck that you used?
A. I did.
Q. Who boughf the oil and gas for the truck?
A. I did.
Q. Who bought the tires for the truck?
A. I did.
Q. Who paid for the repairs on the truck?
A. I did.
Q. Who bought the license tag for the truck?
A. I did.
Q. Did you have a license as a driver or chauffeur?
A. Yes, sir.
Q. Who obtained that?
A. I did.
Q. What did you haul for Mr. Silk?
A. Coal.
Q. Can you fix the years when you did that?
A. Yes, sir.
Q. Will you do it, please?
A. 1936, 1937, and 1938.
Q. During that time did you haul for anyone else?
A. Yes, sir.
Q. What did you haul for other people?
A. Hauled ice for the American Ice Company.
74 Q. Ice, you say?
A. Ice for the American Ice Company.
Q. What else?
A. Rock wool for the Parker Insulating Company.
Q. What else?
A. Cream and milk for the Beatrice Creamery.
Q. What else?
A. Coal for the Central Coal Company.
Q. And what else?

A. Oh, odd jobs such as furniture; I hauled some of that, and some livestock and grain.

Q. Did you haul any rock or building material?

A. I hauled some rock, but that was an individual. I couldn't tell you the name right now.

Q. How did you get these jobs of hauling?

A. Some of them was telephoned in to me through Silk's office.

Q. How did you get the others?

A. Oh, just various ways. Some telephoned to my place.

Q. From people you knew?

A. Yes, sir.

Q. When you were hauling for Mr. Silk, tell the Court whether you were required or ever requested to be there at any particular time.

A. Never was any request to be there at any time to my knowledge.

Q. Was there any requirement or request that you stay until a certain time in the evening?

A. No, sir.

Q. Was there any requirement or request as to whether or not you would go home for your lunch?

A. No, sir.

Q. What was your practice about coming down in the morning?

A. Oh, we usually got there about the time they got there Most of the orders were the best in the morning.

Q. Is that why you went early?

A. Yes, sir; I am after the money.

The COURT. What difference would there be in the orders? What is a good order?

75 A. The day's run, they started pretty good in the morning and the men who would get out——

The COURT. You got more orders in the morning?

A. That is right.

The COURT. Would you get more money on one order than on another?

By Mr. GLENN:

Q. How were you paid?

A. By the ton.

Q. If you had a five-ton load?

A. I figured that way.

Q. You would make more money?

A. Yes, sir.

Q. Were the early morning hours for larger loads as a rule?

A. I couldn't say that so.

The COURT. How about the distance of the haul?

A. Distance of the haul, that would make no difference.

The COURT. Why not?

A. You mean the price of coal for the distance, whether it made some difference? There was exception made for outside the city limits. He paid more.

By Mr. GLENN:

Q. What was your practice if you didn't go down early in the morning, when would you go down?

A. Whenever I would get around to get down.

Q. Would you at times make other trips before or deliveries before you went to the Silk place in the morning?

A. Yes; I have done some stuff.

Q. When did you leave in the afternoon?

A. Well, if I had something else to do I would go and do it and leave.

Q. After you made a delivery for Mr. Silk, would you have to report back to the office?

A. Absolutely not.

Q. As a matter of fact, as a matter of practice, did you usually report back to the office?

A. No, sir.

76 Q. Were you required to carry Mr. Silk's address on any of your trucks?

A. No, sir.

Q. Were you required to carry his telephone number on your truck?

A. No, sir.

Q. Were you required to carry any kind of sign or insignia of such showing you were hauling for him?

A. No, sir.

Q. When an order was given to you, Mr. Oldham, tell the Court what right if any you had to refuse that delivery.

A. Well, just like doing anything else under contract. You figured there wasn't enough money in it, you could turn it down.

Q. Did you have any kind of a written contract with Mr. Silk?

A. No.

Q. Did you as a matter of fact turn down orders?

A. I will say I have.

Q. For what reason did you do that?

A. Well, a bad place or wasn't enough money in it?

Q. Explain to the Court how this board, call board or whatever it was, explain how that worked.

A. Oh, it was a little board that someone of the truckers there figured out. They kind of quarreled over which one was next, like any bunch of men would. One was trying to beat the other,

the man that took his order out, and he hung his number on the bottom of the list after he got the order. He worked up to the top, and when the bell would ring someone would holler out the name and he would go over to the office.

Q. What did you do in the time when you were at the yard and not actually hauling?

A. Do anything you want to if you were down at the bottom and orders wasn't moving very swift. You could go up town and come back.

Q. Did you have to ask anyone to do that?

A. No, sir.

Q. If you wanted to be gone a half a day or day, or if you were gone a half day or a day or any length of time, did you have to make any arrangements with Mr. Silk about it?

77 A. No, sir.

Q. Who owned what tools you had on your truck?

A. I did.

Q. That was your shovel and what else?

A. Shovel, a fork, a pick, and wheelbarrow.

Q. There has been some testimony here about the use of chutes. Tell the Court about how the chutes would be used and how often.

A. Well, I think they have been testifying about one percent, and I think that is about right. The chutes were there in the yard, and whenever they called and we figured you could use one, we picked up his chute and used it.

Q. Ever get by without using it?

A. We didn't use it lots of time. We took a chute out and didn't use it. Have to go over a fence or something.

The COURT. Did you have the same of truck; make of truck?

A. No; they was the same size practically, ton and a half; Chevrolets and Fords.

The COURT. The kind where you could dump the body up so it could be very easily unloaded.

A. Never had but one dump truck on the job. The rest of them was all straight trucks.

Mr. GLENN. I believe that is all.

Cross-examination by Mr. KING:

Q. Mr. Oldham, what was your main source of income from September to March during the years from 1936 to 1940?

A. The main source?

Q. That is right.

A. 1936 to 1939?

Q. No; 1936 to 1940.

Mr. GLENN. To which we object as incompetent, irrelevant and immaterial so far as this question is concerned.

The COURT. Objection sustained. You may ask him how much money he made from Mr. Silk.

By Mr. KING:

Q. I thought it would save a little trouble. Approximately how much were your earnings from September to March in the years 1936 to 1939 inclusive?

Mr. GLENN. I make the same objection.

The COURT. Objection overruled. From Mr. Silk, you mean?

Mr. KING. That is right.

A. I wasn't there in 1938.

Q. I mean 1939.

A. You said to 1939.

Q. Well, how long did you work for him?

A. 1936 to 1938.

Q. All right, during those years what was your average earnings per month?

A. I don't know. I could just guess at it.

Q. That is all right; from September to March.

Mr. GLENN. To which I object.

The COURT. Objection overruled. Just from coal hauling from Mr. Silk.

A. You mean the three years, 1936, 1937, 1938; three seasons?

Q. I mean just your average monthly earnings.

A. You want the amount?

Q. Yes; I want your average monthly earnings.

The COURT. One hundred or two hundred dollars or what, per month?

A. Oh, I would say one hundred and seventy-five maybe.

Q. One hundred and seventy-five dollars a month?

Mr. GLENN. The reason for my objection, and I wish to object again, I don't know if this is used for computing a tax.

Mr. KING. No, it is not.

Mr. GLENN (continuing). As a basis for computing a tax if one should be due.

The COURT. That doesn't make any difference.

Mr. GLENN. Well, it just isn't accurate enough for that purpose, if that was the purpose for asking.

By Mr. KING:

Q. During this same period of time now, what was your average earnings from all other work that you performed with your truck for outsiders, for others than Mr. Silk?

Mr. GLENN. To which we make the same objection, incompetent, irrelevant, and immaterial.

The COURT. Objection overruled.

A. Ain't any way of knowing. I have to guess. One way of guessing would be as good as another.

By Mr. KING:

Q. You guessed as to the amount you made from Mr. Silk. Did you make half that much from outside sources?

A. Half of one hundred and seventy-five dollars?

Q. Yes.

A. Oh, I would say twenty-five of it.

Q. Twenty-five dollars a month?

A. Twenty-five of the one hundred and seventy-five I made in outside sources. That is what I am trying to get in.

Q. Let's go back, then. You made about one hundred and fifty dollars from Silk?

A. That is right.

Q. From Mr. Silk, and about twenty-five dollars average from outside hauling; is that right?

A. Yes; now that is for the six months' season I worked there.

Q. That is right, from September to March.

A. Okay.

Q. And that would apply for the years 1936 to 1938, inclusive?

A. Yes, sir.

Q. How long did you work with Mr. Silk?

Mr. GLENN. I object to it as repetition. He has testified to it two or three times.

The COURT. How long did you work for him?

80 A. 1936, 1937, 1938, but you see that is three a season; now wouldn't figure out three years.

Q. I know. Mr. Oldham, you said that you would leave at various times, and you did not have to come to work at any time; any particular hour?

A. That is right.

Q. Were you pretty regular in appearing?

A. Pretty regular, as regular as any man is when he has to eat.

Q. Mr. Oldham, do you say that you left, and when you did you never reported to Mr. Silk or anybody in the office that you were going to leave, as to approximately when you might return?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you carry signs of Mr. Silk during the years of 1936 to 1937?

A. Oh, I think there was a short time there I carried them. It wasn't compulsory.

Q. I didn't ask you that, and I ask that that be stricken from the record.

The COURT. Objection overruled.

Q. Did you carry signs during the years 1936 and 1937?

A. I did in 1937.

Q. When did Mr. Silk have these signs made?

A. I don't know.

Q. Do you know if it was in the year 1936, if I refresh your memory?

A. They was there when I was there. I don't remember.

The COURT. Signs referring to Mr. Silk?

A. I don't know.

The COURT. Did he ask you to carry them?

A. No, sir.

Q. Did anybody ask you?

A. No, sir.

By Mr. KING:

81 Q. Isn't it true, Mr. Oldham, the yard foreman told you they were there and anybody who was a truck driver could put them on his truck?

A. Never told me that.

Q. He never told you that?

A. Never told him that.

Q. Did you ask permission from anybody to put the sign on your truck?

A. No, sir.

Q. You just automatically put them on?

A. Sure.

Q. What did the sign say?

A. Silk Coal Company.

Q. Any phone number?

A. I don't remember if there was a phone number or not.

Q. Mr. Oldham, isn't it true that at times when this bell was rung and the man that was at the top of the list went over to the office that he was refused an order and that another man had to take his place to take it? In other words, the office would not give him the order even though he was first up?

A. I can't say that I know anything about that.

Q. Do you know of any time the man who was first up went over, and came back, didn't want it?

A. Yes; but I don't know why he didn't want it.

Q. You do not know why he did not haul it?

A. I wasn't in there.

Q. About one out of every one hundred times that you made a trip, was the only time you took a chute?

A. That is right.

Q. About once out of one hundred?

A. Yes.

Mr. GLENN. That is all.

Mr. KING. That is all.

82 GEORGE KIRBY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

Mr. KING. I believe this man is working there at the present time and I again ask that the rule be invoked.

The COURT. We are not going to call any more.

Mr. KING. Is this the last one?

Mr. GLENN. I have all these here.

The COURT. I don't care. It is just cumulative.

Mr. GLENN. I do have one unloader that I would like to put on.

The COURT. He will just testify as to the others. I don't care to have any additional facts to be brought out. Have you heard the last witness testify?

A. Yes, sir.

The COURT. Will your testimony be the same as his?

A. Yes, sir.

The COURT. All right; that is all.

Mr. GLENN. I just wanted to ask this one question. How long has it been since you have taken a chute on a job; a delivery?

A. It's been so long I can't remember that, a year anyway. I don't carry now any chutes at all.

By Mr. GLENN:

Q. What do you do about taking a chute in cases where the office tells you a chute has been requested?

A. I don't take the work.

Q. You mean you turn it down?

A. Yes, sir.

Q. There is one other thing I want to show by this man. There was some testimony here, testimony by Mr. Taylor about the truckers going hunting. Are you one of the men that went hunting?

A. Yes, sir.

83 Q. Was that a regular occurrence?

A. Yes, sir.

Q. Did you make any arrangements in advance about going hunting?

A. Not with Mr. Silk.

Q. That is what I mean. How long would you be gone if you went hunting?

A. According to when I left.

The COURT. One day, two days, or a half day?

A. Left in the afternoon and got back in the evening sometime; never come back in the forenoon.

By Mr. GLENN:

Q. Otherwise on all other points your testimony is about the same?

A. That is right.

Cross-examination by Mr. KING:

Q. Mr. Kirby, how long did you work for Mr. Silk?

A. Well, I started in helping on trucks there when I was about thirteen years old, I guess, from 1927 up.

Q. You worked for about fourteen years for him?

A. Something like that.

Mr. GLENN. If your Honor please, I object to the form of the question, working for Mr. Silk, with this witness. I did not go into that.

The COURT. Yes.

Mr. GLENN. It carries an inference.

The COURT. You worked at Mr. Silk's place, did you?

Mr. KING. I beg your pardon.

A. Yes.

The COURT. The question is whether he came under the terms of the Act.

Mr. GLENN. That is it.

By Mr. KING:

Q. Approximately what were your earnings per month during that time?

Mr. GLENN. To which we object.

84 Mr. KING. Let me finish the question, please. Approximately what were your earnings per month from Mr. Silk's Coal Com'any during the time, months of September to April of the years 1936 to 1939 or 1940 inclusive?

Mr. GLENN. Object to that. We didn't go into those matters on direct examination.

Mr. KING. Well, it is the same thing as the other one.

The COURT. Go ahead; what were they?

A. That would be hard for me to answer, as I don't know how much money I made.

By Mr. KING:

Q. I mean just your per month earnings.

The COURT. Did you earn two hundred dollars per month, one hundred and fifty, or what?

A. Oh, around thirty dollars a week.

Q. Is that your total earnings, or just from Mr. Silk.

A. Mr. Silk.

Q. That was about thirty dollars a week from him?

A. Yes.

Q. All right. What did you make from any outside source whatsoever during this same period of time?

A. Oh, it run all the way from three or four dollars a week to fifteen or twenty, and that didn't happen every week.

Q. Did you report pretty regularly at seven o'clock in the morning?

A. I did.

Q. Did you ever ask permission to leave?

A. No, sir.

Q. Not from anyone?

A. No, sir.

Q. What years did you carry a sign: Mr. Silk's sign on your truck?

A. I guess part of one year, about 1936 to 1937. I don't remember.

Q. How did you come to use the sign, please?

A. It was laying around and I picked it up.

Q. When did Mr. Silk have the signs made?

A. I don't know.

Q. Do you know if he had them made?

85 A. No; I don't know who had them made.

Q. Mr. Kirby, do you know at any time the man who was at the top of the list for an order, that the office didn't use him, refused to let him take any order? Do you know if there were any such times?

A. No; I couldn't say that there was.

The Court. Did they get someone else to take that order?

A. I never was turned down.

Q. You never were turned down?

A. No, sir.

The Court. Do you know of any case where the customer asked for a particular driver?

A. Yes; they have done that.

The Court. Then the man at the top of the board didn't get that order, did he?

A. That is according. If the man they had asked for was not hauling.

The Court. Suppose he was there and come in?

A. I don't know anything like that, how they worked it.

Q. You said too that they have a number of people, or that you had a number of people that you had hauled for a number of years, and they sometimes requested you to make a particular delivery?

A. Well, yes; I have got I think two in Topeka.

Q. Only two?

A. That is my friends of mine that I haul coal to. I don't know as they request it.

The COURT. But you get their orders?

A. That is right.

Q. These tickets you receive from the office when you go to get an order, Mr. Kirby, do they have on them the amount of coal you are to take?

A. Yes.

Q. And the kind of coal?

A. Not all.

Q. Not always?

A. Not always the kind.

Q. Usually they have the kind of coal though, don't they?

A. Well—

Q. I mean there are twenty-one different kinds of coal down there; is that right?

A. That is right.

Q. Do they usually have that?

A. Some of them has mine run coal on it. That can mean any kind of coal.

Q. Who tells you where to go to get that coal?

A. Well, I just been there long enough to know where it is all there.

Q. Does the yard foreman direct the activities of the truckers as to which bin they are to get the coal out of? Hasn't that been the practice for years?

A. He does to a certain extent, but they ain't very many of them pay any attention to him.

Q. Do the tickets have the price to be charged on them?

A. Some of them has got the price on and some don't.

Q. Has Mr. Silk ever told you not to deliver coal unless you collect the price beforehand?

A. When it says collect on the ticket.

Q. Just answer the question. Has Mr. Silk ever told you?

The COURT. I think he has answered that question.

A. It says so on the ticket.

Mr. KING. I didn't get his answer.

The COURT. When it says collect, he collects?

A. Yes; I will collect when it says collect on it. I don't know whether he tells me personally or not. It is all there in these red letters, and you can't miss seeing it.

Q. You mean the tickets also say the size of chute you should take?

Well, they have never had size of chutes on them.

Q. What about plan's? Who furnishes them?

A. I suppose the coal yard furnishes them.

Q. You don't know who furnishes you the planks?

A. They are there at the coal bin.

87 Q. Do you use the electric coal loader in your truck at times?

A. Yes, sir.

Q. In most cases is that true?

A. No; the years you are talking about we did not; very seldom used them.

Q. Why? I mean it would be easier than to load by hand.

A. Sure, it would.

Q. Why didn't you use that?

A. I don't know.

Mr. KING. I think that is all.

Mr. GLENN. That is all.

JOE HEBERLING, called as witness on behalf of the plaintiff, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

The COURT. Who is he?

Mr. GLENN. An unloader.

Q. State your name, please.

A. Joe Heberling.

Q. Where do you live?

A. Topeka, Kansas.

Q. Did you live in Topeka during the years 1936, 1937, 1938, and 1939?

A. I did.

Q. What kind of work were you doing at that time?

A. In 1936, I think I was a garage mechanic at that time.

Q. And in 1937?

A. I started at Mr. Silk's.

Q. What else did you do?

A. Well, just anything that come along that I could make a dollar at.

Q. Was that true during 1938 and 1939 also?

A. It was.

88 Q. Mr. Heberling, were you an unloader? Did you do some unloading of coal for Mr. Silk?

A. I did the first three years I worked for Mr. Silk.

The COURT. How many?

A. The first three years.

Q. What arrangement was made with you about the unloading, that is, as to what you were to be paid?

A. I was paid by the ton.

Q. How much per ton was it?

A. If I remember right at that time it was twenty cents.

The COURT. How much?

A. Twenty cents a ton, if I remember right, and that is for hand unloading.

Q. What tools did you need for this unloading?

A. Principally shovel.

Q. Who furnished the shovel?

A. I did.

Q. What else besides a shovel did you need?

A. Well, if it was lump shovel, and the lumps too big, I used a pick.

Q. Whose pick was it?

A. Mine.

Q. What hours if any were you required to work on that job?

A. That was up to me, just how I felt.

Q. Was there any particular time then in the morning when you were supposed to start?

A. No.

Q. Was there any time in the evening when you were supposed to quit?

A. There was not.

Q. Was there any time when you were supposed to take off for your lunch or dinner?

A. No, sir.

Q. Did you as a matter of fact sometimes work straight through on a car?

A. Sometimes worked on it on the installment plan. Well, it was just exactly how I felt. If I felt good, I would work through till I finished the car. If there was another car coming in where I could work on it ahead of somebody else, the more I would work the more I would make.

89 Q. That was all up to you?

A. Yes.

Q. How were you paid for the work you did. That is, when were you paid, by the day or week or job?

A. Well, Saturday night; if I needed it before I would draw any time during the week.

Q. Did Mr. Silk give you any instructions about unloading the coal except where it was to be placed?

A. That is all.

Mr. GLENN. That is all.

Cross-examination by Mr. FISHER:

Q. Mr. Heberling, what did you do when you finished the unloading; did you work any place else in the yard for Mr. Silk?

A. Well, if there was a lot of coal to clean up in the yard, I would work some by the hour; yes.

Q. Did Mr. Silk call you for that work?

A. Well, the yard boss asked me if I wanted to, or I would ask him if there was anything else to do, if I needed a little extra.

Q. Was that a regular kind of work for you?

A. What do you mean by that?

Q. I mean did you do that—there was a good deal of that, was there?

A. Good deal of that; no, there wasn't.

Q. Was it there for you all the time?

A. If I wanted to.

Q. You could do that kind of work any time?

A. Yes, if I wanted; yes.

Q. That was hour work?

A. In the yard.

Q. By the hour?

A. Yes.

Q. What kind of work was it?

A. Well, it was screening, cleaning up the yard.

Q. Were you under the direction of the foreman on that?

A. Well, if I wanted to listen to him. We just worked for ourselves.

Q. Did he tell you what to do?

96 A. He would tell us what needed to be done, and we would go ahead and do it the way we wanted to.

Q. Did you put in full days at this unloading work?

A. Some days, I did; yes.

Q. What is that?

A. Some days I did; yes.

Q. How many days did you put in in a year?

A. Well, I don't know. I never kept track of it.

Q. What is that?

A. I never kept track of it.

Q. I know, but how did it run? How many days a month then?

A. Well, it would run around two-thirds of them.

Q. It was heavier from September to March, I suppose?

A. Oh, yes. That is what I am talking about, from September to March a year.

Q. You put in full time from September to March?

A. No; about two-thirds of the time unloading, and the rest of the time would be part time in the yard when I felt like working.

Q. How did you say you were paid for the unloading, Mr. Heberling?

A. By the ton.

Q. Was all the unloading paid for on that basis or any other basis?

A. All I unloaded was paid by the ton unless it was a bad car, rough bottom full of holes where I couldn't make any time, and I wouldn't unload by the ton. I would unload by the hour.

Q. Was there a good deal of that?

A. There was some.

Q. And other men did the same kind of work, did they?

A. Yes, there were.

Q. There were a number of you unloaders working together all the time?

A. Well, not together. We generally take a car ourselves.

Q. But they were there working at the same time?

A. At the same time; yes.

Q. How many were there of you generally?

A. Well, I don't know just how many there was to be honest about it.

91 Mr. FISHER. I believe that is all.

Mr. GLENN. That is all.

Mr. GLENN. If the Court please, for the purpose of the record we have several more witnesses of the same kind that we offer up to this hour, and we are willing to continue with the testimony if the Court wants to hear it; just making the offer.

The COURT. I don't care to have you do it. It is cumulative, and I have already a clear picture of your case. Unless the defendant's testimony is such that I would care to hear it, you don't need to put it on.

Mr. GLENN. All right then. We rest.

B. M. TYNER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. FISHER:

Q. What is your name, Mr. Tyner?

A. B. M. Tyner.

Q. Where do you live?

A. Topeka; 401 Lafayette.

Q. What is your work?

A. I am working in the lumber yard now.

Q. Have you ever worked for Mr. Silk?

A. Yes, sir.

Q. When?

A. Well, it was from 1925, I think, on up to about 1935 a little while. I worked for him nineteen years.

Mr. GLENN. Let's get the time fixed.

The COURT. 1925 to 1935.

By Mr. FISHER:

Q. You worked evidently longer than that, if you worked nineteen years, Mr. Tyner?

A. Oh, along through there, when it was.

Q. Did you work after that?

92 A. No, I haven't worked for him since a year ago last September.

Q. What did you do for him since 1935?

A. Until September a year ago.

Q. When did you start at that time, do you mean that was the starting time?

A. No, no; I started before that.

The COURT. Did you start in 1925 and work up until a year and a half ago?

A. Yes, sir.

By Mr. FISHER:

Q. You did not mean then that you stopped in 1935?

A. Oh, no, no. I worked up until a year ago last September.

Q. Yes, I understand you. Tell us about work during the years 1936 to 1939, Mr. Tyner. What kind of work were you doing?

A. Well, I just delivered coal, for Mr. Silk.

Q. How did you start with him delivering coal?

A. How did I start?

Q. Yes; delivering coal. How did you get your work?

A. The starting of it?

Q. Yes.

A. Well, how I started to deliver coal for him, I hauled coal once and used another fellow's truck while he was sick one time, and the next year I bought his truck and went on.

Q. What kind of arrangements did you have with Mr. Silk?

The COURT. You owned your truck?

A. Yes, sir.

By Mr. FISHER:

Q. You had some sort of arrangements about your pay with Mr. Silk?

A. Just the price of pay.

Q. And when you went to work?

A. No; there was nothing said when I should come or when I should quit.

Q. Was there anything said about the hours of work?
A. No, sir.
Q. When did you report?
93 A. When did I report?
Q. Yes; the time of day.
A. Oh, about seven o'clock in the morning.
Q. How did you come to report at seven o'clock?
A. Well, they opened the yard at that time, and ordinarily that is the time for working people to go to work.
Q. How much time did you put in there?
A. Well, just until we got through. Sometimes it was later than other times. I have worked as late as eight o'clock.
Q. You mean until the cars quit coming in?
A. Well, until we got unloaded. We would start from the yard until we got unloaded. Sometimes it would be eight o'clock.
Q. How did you get your calls for this work?
A. How did I get what?
Q. How did you get your calls for this work?
A. [redacted] usually got my orders from the office.
Q. W[redacted] were you at the time the orders came?
A. Well, I couldn't tell you.
Q. Where did you wait, is the question?
A. We waited over in the room we were supposed to wait.
Q. Where was that?
A. Over west of the scales. It used to be the old office.
Q. How did the calls come to you?
A. It come across with a bell.
Q. What happened when the bell rang?
A. Well, whoever was at the top of the list was the man that went in.
Q. Did he always get the order?
A. Well, no.
Q. What happened?
A. Well, there was several reasons why he couldn't get it.
Q. What were they?
A. Well, one of them would be that the customer didn't want that driver. That was the main reason.
Q. In that case what happened?
A. Well, the next man took it.
94 Q. Were there any other reasons why that man didn't get it?
A. Well, other times he wouldn't take it himself.
Q. And why was that?
A. Well, it was on account of the customer and the place.
Q. What happened then?

A. Well, the next man took it. I had customers that I wouldn't deliver at all. We had customers that I couldn't deliver to. Am I right?

Q. Was there ever anything said to you about reporting to work by Mr. Silk?

A. No, sir.

Q. Being available for call?

A. No.

Q. Were you regular in your work there?

A. Yes.

Q. Were there a good many of the men who had been there for a considerable period of time at the same time that you were there?

A. Yes, sir.

Q. How many would you say?

A. Well, I wouldn't say.

Q. Well, a large or a small number.

A. Well, there was maybe two or three percent of them that he could depend on that they would be there.

Q. How many? I mean just an estimate?

A. Well, it would probably be a half a dozen.

Q. How many of you were there all together at the same time generally?

A. Well, there was one time that there was twenty-four of us there, but then they did not have the equipment then that he has now. They couldn't do the work then that he can now.

Q. How many were there usually there?

A. Around ten or a dozen.

Q. About a half-dozen of them were regulars?

A. Yes, sir.

Q. Are any of these men there now?

A. Well, I couldn't say. There is some.

Q. Well, are there some who have been coming there through a period of years yet?

A. Yes, sir.

95 Q. Were you ever reprimanded or called down by Mr. Silk?

A. Yes, sir.

The COURT. Ever what?

Mr. FISHER. Ever reprimanded or called down by Mr. Silk for the work.

A. Yes, sir.

Q. What was the occasion?

A. Well, there was several occasions.

Q. What were they; tell us about that.

A. Well, maybe I didn't do just what I should do.

Q. Tell us; give us some instance.
A. In what way?
Q. Tell us about some of these instances in which you were called down by Mr. Silk. What happened?
A. Well, maybe there was a mess made and the customers kicked about it.
Q. In the delivery of the coal?
A. Yes, sir.
Q. What kind of a mess?
A. Well, it would be dust in the basement.
Q. What happened then?
A. Well, sometimes we cleaned it up and sometimes we didn't.
Q. What do you mean by that?
A. Well, we went back sometimes and cleaned it up, and sometimes they cleaned it up.
Q. How did you happen to go back; Mr. Silk sent you?
A. I was sent back.
Q. You were sent back?
A. Yes, sir.
Q. By whom?
A. Mr. Silk.
Q. Did those things happen often or not?
A. Well, not very often.
Q. Did you have a sign on your truck?
A. I did at one time; yes.
Q. Who furnished the sign?
A. Mr. Silk.
Q. Were there a number of signs there for such use?
96 A. Yes, sir.
Q. Do you remember when they were put there?
A. Well, I couldn't remember what year; no.
The COURT. Did he ask you to use them?
A. No; he did not tell us to use them, but he said they was there.
Q. How long did you say you used the sign?
A. Well, I wouldn't say. I don't remember how long I did use it.
Q. Was it a long period of time or a short period of time?
A. It was just a short period of time.
Q. Did you ever have an accident, or rather, did you ever do any damage making deliveries?
A. Well, yes; we broke windows and such as that.
Q. What happened then?
A. Well, Mr. Silk put them in.
The COURT. Did he charge them to you?
A. No, sir.

By Mr. FISHER:

Q. Do you have a business of your own in trucking, Mr. Tyner?

A. No, sir.

Q. Was this the only work you did of that sort?

A. Yes; only through the summer. Through the summer I generally went and hauled wheat.

Q. Then over this period of time you are talking about in which you worked for Mr. Silk it was part of September and March of each year; is that right?

A. Somewhere around there; yes.

Q. During the winter months?

A. Yes.

Q. Did you make practically all of your income during that period of time from Mr. Silk?

A. Yes.

Q. Did you have an understanding with Mr. Silk about following directions there of anyone, Mr. Tyner?

A. No, sir.

Q. You did not?

The COURT. There was no boss around?

A. Well, he was the only one. A man would naturally
97 think he would be boss. If you haul coal, you would naturally take orders from him.

By Mr. FISHER:

Q. Were there any consequences not following orders?

A. Maybe you get the wrong coal, and have to load it up again.

Q. Did you get any orders from the yard foreman?

A. Very seldom.

Q. What were those orders when you got them?

A. Well, just to what certain bin to get coal out of.

Q. Did you follow his directions?

A. Sometimes.

Q. You mean you disobeyed orders sometimes?

A. Sometimes.

Q. What happened?

A. Well, not very much of anything.

Q. Was anyone ever discharged while you were there?

A. Not as long as I know of, to my knowledge.

Q. Did you know of any man being dropped while you were there?

A. Well, I know of several men being quit, if that is what you mean?

Q. Discharged?

A. Well, just weeded out, to come right out and weed them out I didn't.

Q. I didn't understand you.

A. (Continuing.) Ones that he come right out and laid off, no, although there was a good many of them quit.

Q. Do you know why some of them quit?

A. Not exactly.

Q. What is it?

A. Not exactly.

Q. Well, do you know generally?

The COURT. If you don't, there is no use asking.

Mr. GLENN. Don't give anything he said.

The COURT. You are getting him to speculate, and we don't permit that. If he doesn't know, he doesn't know.

Mr. FISHER. That is all.

Mr. GLENN. No questions.

98 CARL WALL, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. KING:

Q. Mr. Wall, how long did you work for Mr. Albert Silk?

Mr. GLENN. Object to the form of the question. There is an inference there.

By Mr. KING:

Q. All right, how long were you employed?

The COURT. Did you ever work for Mr. Silk?

A. Yes, sir.

The COURT. How long?

A. Oh, about twelve or thirteen years.

By Mr. KING:

Q. About twelve or thirteen years. Are you working there now?

A. Well, part time.

Q. Part time. You worked for him during the years 1936 to 1940?

A. Yes, sir.

Q. In what capacity?

A. Not 1940, but 1939. I pulled off there I think in early 1940.

Q. Were you a truck driver or an unloader?

A. I was a truck driver.

Q. Truck driver?

A. Yes, sir.

Q. Did you ever work as an unloader down there, Mr. Wall?

A. I have.

Q. What period of time were you an unloader?

A. Oh, when I first started there. I don't know, but four years or five years in the yard I guess.

Q. Were you an unloader during 1936 and 1937?

A. No, sir.

Q. You were a truck driver then?

A. Yes, sir.

99 Q. How did you first start to work there, Mr. Wall?

A. Well, Dad worked there and I went down there and helped them unload coal.

Q. Your dad worked there?

A. Yes, sir.

Q. Is he here now?

A. He is our yard foreman.

Q. How long has he worked there?

A. About twenty or twenty-one years.

Q. Did you carry any signs with Silk Coal Company's name on them?

A. Yes, sir.

Q. What year did you carry those signs?

A. Oh, somewhere around 1936 to 1937. I just carried them a couple of short seasons.

Q. How did you get the signs?

A. Oh, I asked the yard foreman what them signs was there for and if I could use them; and he said yes, to take them; and I took them and put them on.

Q. Do you know if Mr. Silk had the signs made?

A. I think he did. I don't know.

Mr. GLENN. If he does not know, I ask that the answer be stricken.

The COURT. Strike it out.

By Mr. KING:

Q. Mr. Wall, have you ever been called down by Mr. Silk for the manner in which you have made a delivery of coal or something you have done at the customer's house?

A. Well, I think I dirtied one place up there once, and he asked if I was the cause of it is all.

Q. Did you go back and clean it up?

A. No, sir.

Q. Have you ever gone back? Has Mr. Silk ever asked you to go back and clean up somebody else's job?

A. Yes, sir: he has asked me if I would.

Q. Did you?

A. Yes, sir.

Q. Were you paid for it?

A. Yes, sir.

100 Q. Did you report pretty regularly during this period of time?

A. Yes, sir.

Q. Were you required to report any particular time of day?

A. No, sir.

Q. Could you leave at any time? I will withdraw that. Did you usually notify Mr. Silk or Mr. Taylor in the office if you desired to leave?

A. I generally did, but lots of times I did not. My dad was over there.

Q. Sometimes you have gone away without notifying them?

A. Yes, sir.

Q. Have you ever attempted to leave and were asked to remain and work?

A. No, sir; I have not.

The COURT. What was that last question?

(Last question and answer read by the reporter.)

Q. Is that right, Mr. Wall?

A. That is right.

Q. What were your average earnings, Mr. Wall, during September to April of the years 1936 to 1939?

A. Well, I had a small truck down there and I averaged right around about twenty-five dollars a week.

Q. Twenty-five dollars a week?

A. Yes, sir.

Q. From the Silk Coal Company?

A. Yes, sir.

Q. Did you haul for other people at that time?

A. Yes; I found me a couple of dollars a month extra.

Q. Have you ever damaged any property when you were making any deliveries?

Mr. GLENN. For whom?

Q. For Mr. Silk. I mean when you were making any deliveries of coal from the Silk Coal Company. Did you ever damage any property?

A. Oh, I broke windows and in fact tore down one clothesline, I think.

101 Q. Did you pay for the damage?

A. No; I fixed the clothesline up myself.

Q. Any other damages; who paid for them?

A. Well, the window lights, I guess the insurance company or Albert or somebody.

Q. You did not pay for them yourself?

A. No, sir.

Q. Did Mr. Silk ever make any remarks to you about the fact that you could not drink and stay on the job down there, Mr. Wall?

The COURT. What has that got to do with this?

Mr. KING. I think if the Court will permit, it is this, I think it will show where it does have something to do.

The COURT. That wouldn't show employment, the fact that he enforced the rule of sobriety. I think it would be a good rule if he did do that.

Mr. KING. I do, too.

The COURT. I don't think it sheds any light on the relationship of employer and employee, what their relationship is, the fact he doesn't have men around who drink.

Mr. KING. I think I can get to it in a different way if the Court please.

The COURT. All right.

By Mr. KING:

Q. Mr. Wall, did any men quit while you were working down there?

A. Yes.

Q. Do you know the reason for their quitting; was because they were not getting proper kind of hauls?

A. I suppose they quit because they wasn't making enough.

Q. Do you know?

Mr. GLENN. He said he supposed.

Q. Do you know? Answer yes or no.

Mr. GLENN. That is of his own knowledge?

Mr. KING. That is right.

The COURT. Do you know of any particular men there
102 who quit because they were not earning enough money, and that is the reason. Do you actually know of any man, Bill Henry, John Smith, or anybody making an excuse that he gave to another trucker or gave it to Mr. Silk?

Mr. GLENN. I can't see where it would be material.

A. Yes; I think one or two.

By Mr. KING:

Q. What was the per ton price that you had been paid for making deliveries when you first went to work for Mr. Silk?

Mr. GLENN. I object to the question, too far back, too remote.

Q. During the years in question, 1936, what was your standard?

A. I was getting seventy-five cents.

Q. Seventy-five cents per what?

A. Seventy-five cents per ton.

Q. Are you making more now?

A. No; I am not working, only part time.

Q. Do you know what the rate of pay is now?

The COURT. Mr. Silk is the one to ask that.

The WITNESS. Well, the time I unloaded a car of coal I got twenty-five cents a ton for it.

Q. You did not work as an unloader during the years 1936 to 1940?

A. No, sir.

Mr. KING. That is all.

Mr. GLENN. That is all. If you reported that you were going to be gone awhile, that was because you were supposed to report, or was it just voluntary on your part?

A. Just on my own part.

Mr. GLENN. There was no requirement that you do that?

A. No, sir.

Mr. GLENN. That is all.

The COURT. Step down.

103 Mr. KING. If the Court please, that is all of our other witnesses outside of two that I have not yet had an opportunity to talk to; it might save time if we would have about a five- or ten-minute recess here. I don't want to put on any others if they will all be cumulative here.

The COURT. You haven't made any case here yet.

Mr. KING. We will see what we can do about it. There are a couple of things that are not just exactly they way I thought it would go.

The COURT. This is an ideal relationship. It seems to me the government should leave it alone. It should not attempt to interfere or stir up trouble between the employer and employee.

Mr. KING. I don't think there is any trouble existing.

The COURT. It might result in it.

Mr. KING. Oh yes; it might result in it.

The COURT. Is this a suit to recover unemployment tax?

Mr. KING. Yes; suit to recover tax paid.

The COURT. But the tax has to be paid whether these men are employees or not. If Mr. Silk does not pay it then they will have to pay it themselves?

Mr. KING. No; they do not have to pay any tax under Title 9, under the Social Security or the Federal Security Contribution Act, and there are no benefits; no.

The COURT. They don't want to. Why not leave them alone?

Mr. KING. The only thing I can say, I would like to talk to about two more witnesses.

(Whereupon a recess was taken at the conclusion of which the following proceedings were had:)

Mr. KING. If the court please, the other witnesses we would introduce would testify about the same as the witnesses we have

already introduced, so I don't believe it is necessary to put
104 on any more witnesses than what has already been put in for the record. We would like to argue the case to the Court for a few minutes, as I said.

Mr. GLENN. We understand that all the evidence is in?

Mr. KING. That is right.

The COURT. Both sides rest?

Mr. KING. Yes.

Mr. GLENN. That is right.

Mr. KING. If the Court please, you will want to hear from both of us on the argument right now, in the usual procedure?

The COURT. The plaintiff should argue first, and then the defendant.

Mr. KING. All right.

(Whereupon counsel for the respective parties made their arguments to the Court at the conclusion of which the Court made the following statement:)

Statement by the Court

The COURT. This is a suit brought by Albert Silk, doing business as The Albert Silk Coal Company, to recover certain taxes heretofore paid to the Collector of Internal Revenue at Wichita, Kansas, on the theory that they were due under the Social Security Law for the years, part of 1936, 1937, 1938, 1939, and the first part of 1940. He contends that he was not liable for these taxes, and they were unduly assessed; that he was forced to pay them, and he brings this under the usual statutory provision for recovery.

The factual situation disclosed by this evidence is that Mr. Silk runs a coal yard here in Topeka, Kansas, and sells coal to people in that town at retail. He owns a piece of property on which there is certain equipment consisting of coal bins and tracks where rail-road cars full of coal are spotted, and also two office buildings opposite each other and between which there evidently is a drive-
105 way to the coal scales thereon. One of these rooms he uses for an office where he keeps his books and his employees, the bookkeeper and foreman are, and on the other side of this driveway, the other building is used for the truckers, so-called; that is, the people who take the orders that come in to him for coal, and get the coal in the yard thereby and deliver it.

The procedure seems to be as follows: The telephone call comes in to Mr. Silk, and he takes down the information, the address, and the amount of coal and makes out a ticket, a duplicate ticket, and then he rings a bell. This bell rings on the other side in the other room where these truckers are. These truckers consist of a number of independent men each of whom own their own

truck, which they have bought and paid for themselves, men who buy their gasoline, their own tires and oil, and own entirely the entire equipment of each truck which consists of the articles I have enumerated. They also have their own shovels, their own forks and wheelbarrows for delivering coal. Apparently they get most of their hauling business from Mr. Silk. But the evidence discloses that in addition to this they do hauling for outside parties when they have the time; they hold no relationship of employer and employee with Mr. Silk; that they just simply sit around there on the chance that they will get an order to deliver coal for him. When he rings the bell the first trucker whose name is on the top of the list or board that the boys voluntarily maintain in their room, their names come up in turn, answers the bell and gets the order for coal. The order he receives from Mr. Silk or his clerk is simply a statement of the amount of coal, the kind of coal and where it is to be delivered and the price. He takes that slip and goes and gets his own truck which he drives and operates himself and goes to the proper bin in the yard and loads it himself with the particular type of coal that the order calls for. He then drives that truck to the address given, that is of the customer, where he delivers the coal, puts it into the cellar and cleans up the mess incident to the delivery of coal. He then either returns to the yard or goes home for the day.

106 According to the testimony of both the truckers and Mr. Silk he exercises no other control over them. They report for work at such hours as they wish, and they leave when they wish, and they come and go absolutely independent of any regulations, rules or contracts with Mr. Silk. In other words, they are independent contractors owning trucks who simply congregate at Mr. Silk's yard and take advantage of his facilities in the hope that they will get an opportunity to haul coal to his customers who telephone him for it. He pays them a uniform price per ton for delivering this coal, which he pays out of the price, he, Mr. Silk, receives from the customer. If the order is a C. O. D., he delivers, the truckers must collect the price and bring it into the office, but no time is specified when he shall pay the money over and according to the testimony of the men, they sometimes keep the money on hand a couple of days before making a settlement in the main office. He also has another class of employees called unloaders. These are men who come to the plant and unload coal from the freight cars into the bins or onto the ground as the case may be. It seems there are twenty-one different kinds of coal to be found on the premises. When a trucker gets an order, it may require him to go to twenty-one different places in the yard where the coal is found either in bins or in piles on the ground, and where he himself of his own efforts and by using an automatic

electric conveyor which Mr. Silk supplies, loads the coal into his truck and goes off with his order. There are no terms of employment. The men are not discharged or hired formally in any way as those terms are used in trade or in business, and the testimony is that these truckers come and go as they wish. If they want to leave early, they can do so, and they do so without the permission of the office. They generally come to work around seven o'clock in the morning because most orders come in early in the morning and they get more loads to haul if they are there early in the morning instead of waiting later in the day the way some of them do. Very often at the same time they haul for other people, hauling grain and foodstuffs, furniture and other material for citizens of the community, and all this without the authorization or
107 interference or control in any way of the plaintiff. The only time when a driver who is at the top of the board, so to speak, does not get the first order that comes in, is when a customer asks for a particular driver, and very often the evidence is that the first driver on the board does not get the order because the customer does not want him, or after the order is exhibited to the driver, the trucker, he for personal reasons of his own does not care to make that delivery and declines it. It is then given to the next man in order on the board.

It is quite clear from this recital of the facts which is undisputed and which, in fact, constitutes the testimony uncontradicted of witnesses called on both sides, that there is no relation of employer and employee between these men. Mr. Silk does not hire them. He does not fire them. He simply maintains an exchange or a place there where these truckers with their own equipment, truck and equipment, can come and obtain orders from him. There is some evidence that this custom obtains in other coal yards in Topeka, and the reason that Mr. Silk gets plenty of drivers is because he pays a higher rate for delivering coal than other competitors in the same market.

The Court therefore finds the issues in favor of the plaintiff and against the defendant, and asks the plaintiff to prepare the proper findings of fact and conclusions of law upon which an order for the plaintiff recovering to the plaintiff the amount prayed for will be decreed. Will you prepare an order and findings and conclusions of law?

Mr. GLENN. I will do that. Shall we forward it to you at Denver?

The COURT. At Denver.

Mr. KING. There is one thing I would like to call the Court's attention to on the findings.

The COURT. I haven't made any finding yet.

Mr. KING. Yes; I know, but did the Court rule on the unloaders here? Are all unloaders regardless of whether they work on a percentage basis in the unloading the coal, or if they work on an hourly basis, in and about the yard, are they all to be considered under the ruling the same?

108 THE COURT. The unloaders, it appears, come to the yard and if there is any coal to be unloaded they are assigned a railroad car to unload and put the coal in certain places. Mr. Silk likewise does not hire these men nor in no way controls their movements. They work as long as they wish, quit when they wish, and furnish their own equipment except that which is used in common with other unloaders on the platform. The same finding will be made as to them as with the truckers.

I, Florence E. Meisner, do hereby certify that I am the contract reporter for the United States District Attorney for the District of Kansas; that at the request of said District Attorney I reported the trial had in the above entitled case at Kansas City, Kansas, by writing the same in shorthand and afterwards transcribing my shorthand notes; that the foregoing 132 pages is a true and correct transcription of my shorthand notes of said trial.

FLORENCE E. MEISNER.

Dated at Topeka, Kansas, December 29, 1943.

Plaintiff's Exhibit No. 1

STIPULATION OF FACTS

1. Plaintiff is a citizen and resident of the State of Kansas, with his principal place of business at Topeka, Shawnee County, Kansas. Defendant is the United States of America.

2. The defendant determined that during the periods from January 1, 1936, to December 31, 1939, certain coal haulers and unloaders were employees of the plaintiff and thus assessed social security taxes and federal unemployment tax against the plaintiff. Plaintiff paid the tax to the Collector of Internal Revenue, Wichita, Kansas, and said Collector is not out of office.

3. On or about February 26, 1940, plaintiff filed with the
109 defendant a claim for refund for the taxes paid, as set forth in plaintiff's complaint herein at paragraph 5;

4. Subsequently said claims for refund were partially allowed by the defendant in the sum of $314.99, with accrued interest in the sum of $38.70, which sums were reimbursed to plaintiff. The defendant disallowed the remaining part of plaintiff's claim for refunds.

5. On or about January 24, 1944, the defendant reassessed taxes for the amount of $353.69, which had been refunded to plaintiff,

and on or about October 17, 1941, collected from plaintiff by means of a tax warrant the reassessment of $353.69, together with interest, penalties, and costs in the amount of $32.10, or a total of $385.79.

RALPH F. GLENN,
Attorney for Plaintiff.
HARLOW B. KING,
Assistant U. S. Attorney,
District of Kansas, Attorney for Defendant.

Filed in the District Court December 13, 1943.

[Clerk's certificate to foregoing transcript omitted in printing.]

110 In United States Circuit Court of Appeals,
Tenth Circuit

Order of submission

Seventy-fifth Day, November Term, Tuesday, March 26th, A. D. 1946. Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN.

This cause came on to be heard, Lester L. Gibson, Esquire, appearing for appellant, Ralph F. Glenn, Esquire, appearing for appellee.

On motion, appellee was granted leave to file twenty printed copies of his brief herein out of time, which was accordingly done.

On motion, appellant was granted leave to file four typewritten copies of a reply brief herein within ten days from this day.

Thereupon this cause was argued by counsel and was submitted to the court.

111 United States Circuit Court of Appeals, Tenth Circuit

No. 3214—November Term, 1945

UNITED STATES OF AMERICA, APPELLANT *v.* ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY, APPELLEE

Appeal from the District Court of the United States for the District of Kansas, First Division

Lester L. Gibson (Sewall Key, Acting Asst. Atty. Gen., J. Louis Monarch and John W. Fisher, Sp. Assts. to Atty. Gen., Randolph Carpenter, U. S. Atty., and Lester Luther, Asst. U. S. Atty., were with him on the brief) for Appellant.

Ralph F. Glenn (Oscar Raines, Wendell L. Garlinghouse and Warren W. Shaw were with him on the brief) for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges.

Opinion.

April 19, 1946.

HUXMAN, Circuit Judge: delivered the opinion of the court.

This was an action brought under Titles VIII and IX of the Social Security Act, and Subchapters A and C of Chapter 9 of the Internal Revenue Code, for the recovery of employment taxes paid under protest. Plaintiff recovered, and the government has appealed. The only question presented by the appeal is
112 whether the truck drivers and coal unloaders in question were employees of Albert Silk, doing business as Albert Silk Coal Company. The court's findings of fact are supported by substantial evidence and are therefore binding upon us. The following is a synopsis of the court's findings:

Appellee is a retail coal dealer in Topeka, Kansas, doing business as Albert Silk Coal Company. He has a large and extensive retail coal business. He does not own any trucks or any other vehicle used for the purpose of delivering the coal he sells. He contracts with individual owners of trucks for the delivery of coal at an agreed price per ton. The delivery trucks do not bear appellee's name, telephone number, or any descriptive advertising matter relating to his business. He owns a parcel of land on which are located his coal bins and tracks where coal cars are spotted for unloading, and two office buildings between which is a driveway to the coal scales. Appellee uses one of these buildings for his office and makes the other available as an assembly place for the truckers. The truckers have arranged a call list or board in the building in which they assemble, on which they enter their names in the order in which they are entitled to respond to a call for the delivery of coal. This was done by themselves for their own convenience. Appellee had nothing to do with the arrangement of the board. When a call comes into the office for coal, a ticket is made in duplicate, with all necessary data thereon. Appellee or his assistant then rings a bell which rings a bell in the building used by the truckers. The trucker whose name is at the top of the list on the board answers the bell and is offered the opportunity to make the delivery. If he desires to make the delivery he gets the order, but if for any reason he desires not to make the delivery, he so informs appellee and rejects the order. He is under no duty to make the delivery. In that case, the man next on the board is entitled to make the delivery if he so desires. After a delivery is made, a trucker is free to go home or return to the yard for other deliveries as he desires. According to the testimony, appellee exercises no control over the truckers. They come and go as they please; they are not formally hired or discharged; they are paid for

whatever coal they deliver. They are paid for what they haul as they request, sometimes after each load, sometimes at the end
113 of the day, and sometimes at end of the week. Frequently they haul coal for other dealers, haul grain, foodstuff, furniture, wood, rock, or any other material for other merchants or for private citizens of the community. This is done without interference or control by appellee over them in any way. The truckers report for work at such hours as they may wish, leave when they wish, and come and go independently of any rules or regulations or contracts with appellee. If they do not want to haul coal, they do not report, or if they want to absent themselves for a week or two and then return, they do so. This in substance presents the relationship between appellee and the truckers.

In addition to the truckers, the status of another class of workers, the unloaders, is involved in the appeal. The unloaders are men who come to appellee's coal yard and unload coal from cars into the bins. If when they come, there is coal to unload they are assigned a car and the bin into which they are to put the coal. They furnish their own tools and are paid an agreed price per ton. They are not regular employees. They come and go as they please. They likewise work for others at times, without the knowledge or consent of appellee. The only direction given to the unloaders is as to the car assigned to them and the bin into which they are required to put the coal.

In order for the government to prevail, the trial court's findings of fact must compel the legal conclusion that the workers in question are employees within the purview of the Act. The Act in question is remedial in its scope and should be liberally construed to effectuate its remedial objectives. It may be conceded that the strict common law concept of employer and employee relationship is not the test for determining such relationship when it comes into question under the remedial provisions of the Act. In a sense, anyone who is engaged to do work for another for wages is an employee. He is employed to do work. But, in the same sense, an independent contractor likewise is employed or hired to do work. Article 205 of Regulation 90, promulgated under Title IX of the Social Security Act, defines employer and employee relationship as follows:

114 "However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed. It is sufficient if he has the right to do so."

Regulation 91 on the Social Security Act, issued by the Bureau of Internal Revenue in 1936, and which was in effect during the time involved herein, contains substantially the same provisions relating to the employer and employee relationship as those contained in Regulation 90.

In Jones v. Goodson, 121 F. 2d 176, we said that:

"In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor."

We also said that only a

"reasonable measure of direction and control over method and means of performing the service is a constituent element of the relationship of master and servant."

The relationship between appellee and the haulers and unloaders fails to measure up to any of the standards laid down in the Act, the regulations promulgated thereunder, or in our interpretation thereof in Jones v. Goodson, supra, and United States
115 of America v. The Wholesale Oil Co., Inc., decided March 15, 1946. In a legal sense, there is no employment. In effect all these laborers are itinerant workers. They come to work if, when, and where they please, and quit in like manner. They may work for one coal dealer today and report at another coal yard tomorrow, or they may haul grain, furniture, or any other commodity for any individual or firm. But even while they work for appellee they are not subject to his control as to the method or manner in which they are to do their work. The undisputed evidence is that the only supervision or control ever exercised or that could be exercised over the haulers was to give them the sales ticket if they were willing to take it, and let them deliver the coal. They were free to choose any route in going to or returning. They were not required even to take the coal for delivery.

We think that the relationship between appellee and the unloaders is not materially different from that between him and the haulers. In response to a question on cross-examination, appellee did testify that the unloaders did what his superintendent at the coal yard told them to do, but when considered in the light of all his testimony, all that this answer meant was that they unloaded the car assigned to them into the designated bin. Immediately after he gave the above answer, he was asked: "Wasn't he the yard

foreman who directed them in their duties?" to which he replied: "Oh, I don't think so. They were told what to unload, where to unload it. He supervised."

The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between appellee and the workers in question.

The decision of the trial court is therefore affirmed.

115 In United States Circuit Court of Appeals

Judgment

Eighty-ninth Day, November Term, Friday, April 19th, A. D. 1946. Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On May 25, 1946, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

117 [Clerk's certificate to foregoing transcript omitted in printing.]

118 Supreme Court of the United States

No. 312, October Term 1946

Order allowing certiorari.

Filed October 21, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Attorney General. File No. 51176. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 312. The United States of America, Petitioner vs. Albert Silk, Doing Business as Albert Silk Coal Company. Petition for writ of certiorari and exhibit thereto. Filed July 18, 1946. Term No. 312 O. T. 1946.

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